

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name DUBYAK, SAMUEL A.
(Last) (First) (Initial)

Prisoner Number D-54700

Institutional Address Box 689 C-115L, CTF-Central, Soledad, CA 93960-0689

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SAMUEL ALLEN DUBYAK
(Enter the full name of plaintiff in this action.)

vs.

BEN CURRY, Warden

(Enter the full name of respondent(s) or jailor in this action)

CV**08**

Case No.

0667

(To be provided by the clerk of court)

**PETITION FOR A WRIT
OF HABEAS CORPUS**

EVIDENTIARY HEARING
REQUESTED

Read Comments Carefully Before Filling In**When and Where to File**

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

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Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

San Bernardino Co. Superior Court, Cucamonga, CA

Court

Location

(b) Case number, if known OCR-12056

(c) Date and terms of sentence 1987; 25 years to life + 2 years.

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes X No

Where? CTF-Central, Soledad, California

Name of Institution: CTF-Training Facility

Address: Hwy 101 North, Soledad, California

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

Parole suitability denial is addressed in the instant petition.

3. Did you have any of the following?

Arraignment: Yes X No

Preliminary Hearing: Yes X No

Motion to Suppress: Yes X No

4. How did you plead?

Guilty Not Guilty X Nolo Contendere

Any other plea (specify) None

5. If you went to trial, what kind of trial did you have?

Jury X Judge alone Judge alone on a transcript

6. Did you testify at your trial? Yes No X

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes X No

(b) Preliminary hearing Yes X No

(c) Time of plea Yes X No

(d) Trial Yes X No

(e) Sentencing Yes X No

(f) Appeal Yes X No

(g) Other post-conviction proceeding Yes No X

8. Did you appeal your conviction? Yes X No

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes X No

Year: 1987 Result: Relief denied

Supreme Court of California Yes X No

Year: 1989(?) Result: Relief denied

Any other court Yes X No

Year: 1987-95 Result: Relief denied

(b) If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes _____ No X

2 (c) Was there an opinion? Yes X No _____

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Does not apply to this petition Yes _____ No _____

5 If you did, give the name of the court and the result:

6 Does not apply to this petition

7 parole suitability denial at the BPT trial

8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to
9 this conviction in any court, state or federal? Yes X No _____

10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit
13 for an order authorizing the district court to consider this petition. You may not file a second or
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28

15 U.S.C. §§ 2244(b).] Does not apply to this cause of action.

16 (a) If you sought relief in any proceeding other than an appeal, answer the following
17 questions for each proceeding. Attach extra paper if you need more space.

18 I. Name of Court: Does not apply to this cause of action

19 Type of Proceeding: Does not apply

20 Grounds raised (Be brief but specific):

21 a. Does not apply

22 b. //

23 c. //

24 d. //

25 Result: // Date of Result: N/A

26 II. Name of Court: Does not apply to this cause of action

27 Type of Proceeding: //

28 Grounds raised (Be brief but specific):

Does not apply to this cause of action

1 a. Does not apply to this cause of action
 2 b. //
 3 c. //
 4 d. //
 5 Result: // Date of Result: N/A

6 III. Name of Court: Does not apply
 7 Type of Proceeding: //
 8 Grounds raised (Be brief but specific):
 9 a. Does not apply
 10 b. //
 11 c. //
 12 d. //
 13 Result: // Date of Result: N/A

14 IV. Name of Court: Does not apply
 15 Type of Proceeding: //
 16 Grounds raised (Be brief but specific):
 17 a. Does not apply
 18 b. //
 19 c. //
 20 d. //
 21 Result: // Date of Result: N/A

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes X No _____

24 Name and location of court: This court (N.D. Cal.)

25 B. GROUNDS FOR RELIEF Case No. C-06-0707 JSW (pr)

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
 27 support each claim. For example, what legal right or privilege were you denied? What happened?

28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: See attached petition with points and authorities in
6 support.

7 Supporting Facts: See attached petition
8
9
10

11 Claim Two: See attached petition
12

13 Supporting Facts: See attached petition
14
15
16

17 Claim Three: See attached petition
18

19 Supporting Facts: See attached petition
20
21
22

23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:

25 All claims were exhausted in all state courts. ORDER's attached hereto;
26
27
28

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 See attached petition with points and authorities in full

5
6
7 Do you have an attorney for this petition? Yes____ No x

8 If you do, give the name and address of your attorney:

9 Petitioner is proceeding pro per as an obvious layman at law

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12
13 Executed on 1-16-2008

14 Date

Samuel D. Suby

Signature of Petitioner

15
16
17
18
19
20 (Rev. 6/02)

Court of Appeal, Fourth Appellate District, Div. 2 - No. E044276
S157841

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re SAMUEL A. DUBYAK on Habeas Corpus

The petition for review is denied.

Werdegar, J., was absent and did not participate.

**SUPREME COURT
FILED**

JAN - 3 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

PETITION FOR REVIEW
IN THE
SUPREME COURT OF CALIFORNIA

Comes now, Samuel A. Dubyak, Petitioner in pro se, and through this verified petition for review requests this Honorable Court to review and adjudicate the claims raised thus reviewing the denial(s) from the Appellate and Superior Courts (attached hereto) as both are without a 'reasoned opinion', semi post card denials.


Petitioner contends that the denial by the Superior Court was a miscarriage of the intent of the habeas corpus act as the Superior courts obvious biased language simply because petitioner has claimed innocence, and that court did not adjudicate the "CLASS OF ONE" claim that is independent of being found suitable for parole by the Board.

The Appellate Court's 'post card denial' was a denial on the merits (citations) and that court failed to give a 'reasoned opinion'.

As this Court will discover upon a full and fair reading of this petition for review, the lower courts were obligated to consider 'all' issues/claims and not just make a finding that; "Petitioner's calculating nature, coupled with his persistent denial of culpability, and his stubborn refusal to program as directed.." (Emphasis added). The courts failed to consider the facts of the petition and only relied on the Board's form/rote language and the courts obvious bias is clear because Petitioner, after 21 years, still maintains actual innocence.

In the case of City of Auburn v. Quest Corp., 260 F.3d 1160 (9th Cir. 2001): Under the Supremacy Clause, the state courts are obligated to apply and adjudicate federal claims that were fairly presented to them.

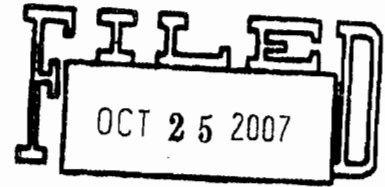
Respectfully submitted,



Samuel A. Dubyak

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER



COURT OF APPEAL FOURTH DISTRICT

In re SAMUEL A. DUBYAK

E044276

on Habeas Corpus.

(Super.Ct.Nos. OCR12056 &
WHCSS700257)

The County of San Bernardino

THE COURT

The petition for writ of habeas corpus is DENIED.

McKINSTER

Acting P.J.

cc: See attached list

COPY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
Civil Division, Department S-32
303 West Third Street
San Bernardino, California 92415

COPY

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

AUG 20 2007

BY *Olivia McDonald*
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT**

In re the Petition of

SAMUEL A. DUBYAK,

For Writ of Habeas Corpus.

Case No. WHCSS-~~0287~~ ⁷⁰⁰²⁵⁷

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

The Petition of SAMUEL A. DUBYAK for Writ of Habeas Corpus was filed in this Court on August 9, 2007.

Therein, Petitioner contends that there was no evidence presented which justified the denial of his parole on October 24, 2006.

From the transcript of the suitability hearing, the court determines that the eligibility board considered the following factors and facts:

1) The circumstances of the committing offense.

Petitioner shot his wife to death in her bed in the family home. He attempted to destroy the evidence of the murder, the bed, by cutting out of the mattress the bloody bullet holes and dumping the bed along the side of the road. He falsely claimed to police officers that his wife had disappeared and taken the bed with her. He manufactured a letter on which he forged his wife's signature so that it would appear that his wife was still alive. He persists in claims of innocence.

2) Prior criminal record.

1 He had a burglary arrest as a juvenile but no prior criminal convictions.

2 3) Social History.

3 Petitioner had been a commercial pilot. He has had five children. He did not
4 abuse alcohol or drugs.

5 4) Conduct while incarcerated.

6 Petitioner has had very few, and only minor, disciplinary experiences while
7 incarcerated. He has taken numerous college courses, and has completed a Real
8 Estate course, and an Accounting course. He obtained a B.A. in 2001. He has
9 studied French and Spanish.

10 5) Psychological Assessments.

11 His violence potential is lower than that of the average citizen.

12 6) Parole Plans.

13 Based on the evidence before it, the panel concluded that Petitioner poses an
14 unreasonable risk of danger to society if released. (The transcript says the opposite
15 but it is clear from the context what was meant).

16 Petitioner's calculating nature, coupled with his persistent denial of culpability, and
17 his stubborn refusal to program as directed by the eligibility board would give any
18 reasonable person a deep concern that Petitioner might harm others if the
19 circumstances justified it, to his mind.

20 There was ample evidence presented to justify the board's decision.

21
22 The Petition is denied.

23
24 Dated this 20th day of August, 2007.

25
26 **JOHN P. WADE**

27 **JOHN P. WADE**
28 Judge of the Superior Court

STATE AND FEDERAL CLAIM NUMBER ONE (I)
CALIFORNIA PENAL CODE §3041(a)(b) CREATES A PROTECTABLE
LIBERTY INTEREST AT A PAROLE SUITABILITY HEARING, AND A
"REASONABLE" EXPECTATION OF A RELEASE DATE. THE COMMANDING
WORD "SHALL" CLEARLY ESTABLISHES THIS EXPECTATION.

Under California law, a convicted person sentenced to a term of 15/25 years
'to life' shall be released on parole unless his release would pose an
unreasonable risk to public safety or unreasonable risk to society if released
from prison. Cal. P.C. §3041(a)(b); Cal. Code of Regs., Title 15, §§2400-2411.

DUE PROCESS IN THE PAROLE CONTEXT

The Fifth and Fourteenth Amendments prohibit the government from depriving
an inmate of life, liberty, or property without due process of law. United States
Constitutional Amendments, V, XIV.

It is now settled that California parole scheme, codified in California
Penal Code section §3041, vests all "prisoners whose sentences provide for the
possibility of parole with a constitutionally protected liberty interest in the
receipt of a parole release date, a liberty interest that is protected by the
procedural safeguards of the Due Process Clause." Irons v. Carey, 479 F.3d 658,
662 (9th Cir. 2007) (citing Sass v. California Board of Prison Terms, 461 F.3d
1123, 1128 (9th Cir. 2006); Biggs v. Terhune, 334 F.3d 910, 914 (9th Cir. 2003);
McQuillon v. Duncan, 306 F.3d 895, 903 (9th Cir. 2002)).

Under the "clearly established" framework of Greenholtz and Allen, we hold
that California's parole scheme gives rise to a cognizable liberty interest on
parole. The scheme "creates a presumption that parole release will be granted"
unless the statutorily defined determinations are made." Allen, 482 at 378
(quoting Greenholtz, 442 U.S. at 12). In, In re Deluna, 126 Cal.App.4th 585,
24 Cal.Rptr.3d 643 (2005), held that under Rosenkrantz and McQuillon, parole
applicants continue to have a "liberty interest" in parole release.

//

//

STATE AND FEDERAL CLAIM NUMBER TWO (II)
 THE BOARD (BPH) VIOLATED PETITIONER'S DUE PROCESS AND EQUAL
 PROTECTION RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENT
 OF THE U.S. CONSTITUTION, AND, CALIFORNIA CONSTITUTION ARTICLE
 I, Sec. 7(a), WHEN THEY FAILED TO SET A RELEASE DATE AND/OR
 UNIFORM TERM AFTER PETITIONER WAS FOUND SUITABLE FOR PAROLE
 AND FOUND NOT TO BE A THREAT TO PUBLIC SAFETY.

On October 24, 2006 Petitioner went before the Board of Prison Hearings
 (herein after "Board") for his second/subsequent suitability hearing, the subject
 of the instant petition before this Court.

The panel consisted of James Davis, Presiding Commissioner, Noreen Blonien,
 Deputy Commissioner, Peter Ferguson, Petitioner's Board appointed attorney.

As the record establishes, Petitioner did not receive his hearing transcripts
 until July 23, 2007, 9 months late and 2 months late on the 2nd hearing, see
 attached Monterey County Order and the Attorney General's response attached
 hereto.

Petitioner submits that he was found suitable, and, would not pose a threat
 to the public at his hearing (Exhibit "A" p.39):

Commissioner Davis stated at (Ex "A") p.39: "...the panel reviewed all the
 information received from the public and relied on the following circumstances
in concluding that the prisoner suitable for parole and would not pose
unreasonable risk of danger to society or threat to public safety if released
from prison." (Emphasis added). Therefore Penal Code §3041(b) has been satisfied
 in that Petitioner does not pose a threat to public safety.

The "overarching consideration" in determining whether to grant parole "is
 'public safety.'" (See, In re Scott (2005) 133 Cal.App.4th 573, 591 (Scott II).)
 That is, under the applicable "Penal Code section §3041, the Board 'shall set
 a release date unless it determines that the gravity of the current convicted
 ... offenses, or the timing and gravity of current or past convicted ... offenses,
 is such that consideration of the public safety requires a more lengthy period
 of incarceration for this individual...". The goal of subdivision (a) of Penal

1 Code section §3041, it has been noted, is that "release on parole is the rule,
2 rather than the exception." (In re Smith (2003) 114 Cal.App.4th 343, 351 (Smith)
3 accord In re Lee (2006) 143 Cal.App.4th 1400, 1405 (Lee) ["defendant sentenced
4 to indeterminate life term is normally entitled to parole if the board finds
5 he does not pose an unreasonable risk to public safety"]). (In re David Barker,
6 2007 DJDAR 7548, May 24, 2007).

7 As the Court of Appeal put it in Lee, 143 Cal.App.4th, p.1414: "To deny
8 parole, the reason must relate to a defendant's continued unreasonable risk to
9 public safety."

10 "A life term offense or any other offenses underlying an indeterminate
11 sentence must be particularly egregious to justify the denial of a parole date."
12 (Rosenkrantz, 29 Cal.4th at p.683, 128 Cal.Rptr.2d 104, 59 P.3d 174). Also, In
13 re Ramirez, (9-13-2000), (94 Cal.App.4th 549), that court held that: parole could
14 not be withheld absent a factual finding that the offense was "particularly
15 egregious".

16 As Exhibit "A" establishes, not only was Petitioner found suitable for
17 parole, and, would not pose unreasonable risk of danger to society or threat
18 to public safety (at p.39), it is evident from the record (pages 39-43) that
19 the Board used the following excuses from their Rules and Regulations, Title
20 15, §2402 criteria to deny a release date and/or a uniform term setting under
21 P.C. §3041(a):

22 1). "dispassionate and calculated." (p.39). Note* Subdivision (c) of §2402
23 sets forth six factors tending to show unsuitability for parole, which include:
24 (B) The offense was carried out in a dispassionate and calculated manner, such
25 as an execution-style murder. Therefore "dispassionate and calculated manner"
26 cannot be applied to Petitioner as he was not tried or convicted of an execution-
27 style murder.

28 2). "motive ... inexplicable." (p.39).

1 3). "Juvenile arrest (no disposition) in 1957." (p.39).

2 4). "used a firearm." (p.39).

3 5). "programmed ... limited manner." (p.39).

4 6). "one 128 counseling chrono." (p.40).

5 7). "one serious 115 in 1994." (Classified as 'Administrative'). (p.40).

6 It is apparent that there is "no evidence" in the record under either the
7 "some evidence" standard, or, "preponderance of evidence" standard, or, even
8 a "modicum" of evidence to support the Board's arbitrary action in not setting
9 a release date for Petitioner after he was found suitable or a term setting as
10 the record establishes that Petitioner has passed through the 'gateway' imposed
11 by §3041(b) to enter into the realm of §3041(a).

12 The Board's arbitrary action to not follow Penal Code §3041(a) deprived
13 Petitioner of a parole date by not calculating his term. The Board cannot apply
14 or use Title 15 C.C.R. §§2400-2411 to over-ride the Legislative intent of P.C.
15 §3041(a)(b). Subsection (b):

16 "The panel or board shall set a release date unless it determines that
17 the gravity of the current offense or offenses, or the timing and
18 gravity of current or past convicted offense or offenses, is such that
19 consideration of the public safety requires a more lengthy period of
20 incarceration for this individual, and that a parole date, therefore,
21 cannot be fixed at this meeting."

22 "After the effective date of this subdivision, any decision of the
23 parole panel finding an inmate suitable for parole shall become final
24 within 120 days of the date of the hearing." (Note* Petitioner's hearing
25 was on October 24, 2006, and, became final within the intent of P.C.
26 §3041(b), on February 21, 2007.)

27 When an administrative regulation conflicts with a statute, the statute
28 controls. (Government Code §11342.2).

Regulations that contravenes a statute is/are invalid. R & W Flammann GMBH
v. U.S., 339 F.3d 1320 (Fed. Cir. 2003).

A statute by its very nature, trumps conflicting regulations. Caldera v.
J.S. Alberici Const. Co. Inc., 153 F.3d 1381 (Fed. Cir. 1998).

1 An agencies regulations cannot legitimate the violations of constitutional
2 or statutory rights. U.S. v. Marolf, 173 F.3d 1213 (9th Cir. 1999).

3 A regulation (Title 15 C.C.R. §§2400-2411) cannot over-ride a clearly stated
4 statutory enactment (P.C. §3041(a)(b).) Aerolineas Argentinas v. U.S., 77 F.3d
5 1564 (Fed. Cir. 1996).

6 In Willis v. Kane, USDC N.D. Cal. No. 05-3153 (April 26, 2007), among other
7 issues, the court held that:

8 "Willis' petition for writ of habeas corpus is GRANTED. Having decided
9 that the petition will be granted, the next issue concerns the proper
10 remedy. Because Willis has never been found suitable for parole, the
11 BPH has never moved past the suitability-finding function in California
12 Penal Code §3041(b) to calculate a term and set a release date as
13 required by §3041(a). It is now time to do so. Within thirty days of
14 the date of this order, the BPH must calculate a term for Willis and
15 set a date for his release in accordance with the requirements of
16 California Penal Code §3041(a)." (Emphasis in original).

17 The California Supreme Court has concluded that the "nature of the prisoner's
18 offense, alone, can constitute a sufficient basis for denying parole." Dannenberg,
19 29 Cal.4th at p.682. One indicator of parole unsuitability is that "[t]he prisoner
20 committed the offense in an especially heinous, atrocious or cruel manner."
21 (Regs., §2402, subd. (c)(1).) The Dannenberg majority decided that the Board
22 and Governor can find the commitment offense to be especially heinous, atrocious
23 or cruel so long as the crime involved elements beyond "the minimum necessary
24 to sustain a conviction for that offense," without comparing the crime to other
25 similar crimes. (Dannenberg, supra, 34 Cal.4th at pp. 10941098). (See, In re
26 BRANDEE TRIPP, 2007 DJDAR 5877).

27 Nonetheless, the Board found Petitioner 'suitable' and 'that he would not
28 pose a threat to the public'. It is apparent that the Board did not set a uniform
term, (See, P.C. §3041(a)), within the Matrix, as Petitioner has currently served
28 28 years (inclusive of earned credits), and, the Boards citations to Petitioner's
commitment offense, a 50 year old juvenile issue (with no disposition), his 128
counseling chrono, a 115 with an age of 13 years which was an "administrative"

1 action because of mailing out legal work for another inmate (proof of service),
2 Petitioner's use of a firearm, his alleged lack of programming although Petitioner
3 works on college courses, studies 2 languages, does video reports, and, the fact
4 that the denial of a release date for '3' years with EXACTLY the same rote
5 language as was used to deny Petitioner's release and/or uniform term setting.

6 At p.41 of (Ex. "A"): "With regard to parole plans, we find that you do
7 have appropriate residential parole plans." "With regard to employment, the Panel
8 notes that you are eligible for Social Security."

9 One of the implementing regulations, 15 Cal. Code Regs. §2401, provides:
10 A parole date shall be set if the prisoner is found suitable for parole under
11 Section 2402(a). "A parole date set under this article shall be set in a manner
12 that provides uniform terms for offenses of similar gravity and magnitude with
13 respect to the threat to the public." The regulation also provides that "[t]he
14 panel shall first determine whether the life prisoner is suitable for release
15 on parole. Regardless of the length of time served, a life prisoner shall be
16 found unsuitable for and denied parole if in the judgment of the panel the
17 prisoner will pose an unreasonable risk of danger to society if released from
18 prison." Under state law, the matrix is not reached unless and until the prisoner
19 is found suitable for parole. Id at 1070-71; 15 Cal. Code Regs. §2403(a) ("[t]he
20 panel shall set a base term for each life prisoner who is found suitable for
21 parole"). See, Thomas v. Brown, USDC N.D. Cal., No. C05-1332, Dec. 21, 2006.

22 Although Petitioner was found suitable, and, would not pose a risk to
23 society, CLAIM (III) establishes that an inmate does not have to be found suitable
24 to receive a uniform term set and/or release date. See, Exhibits "B & C".

25 The "PSYCHOLOGICAL EVALUATION", dated August 2006, (Ex. "D"), "his violence
26 potential is lower than the average citizen." Supporting the Board's conclusion
27 that Petitioner would not pose a risk to society, also, no where in the Evaluation
28 is there a need for any 'anger management' self-help book reports.

STATE AND FEDERAL CLAIM NUMBER THREE (III)

THE BOARD (BPH) VIOLATED PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, AND, CALIFORNIA CONSTITUTION ARTICLE I, Sec. 7(a), WHEN THEY FAILED TO CONSIDER A PAROLE RELEASE DATE UNDER P.C. Section §3041(a), (SEPARATE AND DISTINCT TREATMENT OF A "CLASS OF ONE").

For an equal protection claim to proceed Petitioner must allege specific facts in support of his claim. A habeas petitioner has the burden of alleging specific facts that show a federal claim is presented, or the petition is subject to dismissal. *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995). Conclusory allegations do not warrant habeas relief. *Id.* at 204.

Petitioner's allegations are not conclusory, they state a prima facie equal protection claim under both the California and U.S. Constitution.

The U.S. Constitutions Fourteenth Amendment Equal Protection Clause provides that no State shall deny to any person "the equal protection of the laws." See also, California Constitution Article I, Sec. 7(a). The Equal Protection Clause ensures that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To prevail on an equal protection claim, Petitioner must initially show that he was treated differently from other similarly situated persons. *City of Cleburne*, supra, 473 U.S. at 439; *Fraley v. U.S. Bureau of Prisons*, 1 F.3d 924, 926 (9th Cir. 1993).

The mere fact that some inmates convicted of second degree murder may have been paroled sooner than Petitioner does not establish the basis for a federal equal protection claim. See, *Sturm v. California Adult Authority*, 395 F.2d 446, 448-49 (9th Cir. 1967) (holding that, "the fact that other prisoners have had their sentence reduced, or been granted parole, affords no ground for complaint by petitioner.")

However, Petitioner's equal protection claim lies elsewhere, other than a mere comparison between an inmate released earlier or paroled sooner than himself, as set forth herein.

EQUAL PROTECTION UNDER "CLASS OF ONE"

In the case of In re MIKAEL SCHIOLD, Court of Appeals, First Appellate District, Division Five, Case No. A103107, attached hereto with MOTION FOR JUDICIAL NOTICE, as Exhibit "B". (With reference to numbered paragraphs).

Schiold was transferred to the country of Sweden, under the "SETTLEMENT AGREEMENT AND FULL AND FINAL RELEASE OF ALL CLAIMS", on habeas corpus. Schiold and Respondents entered into a "SETTLEMENT AGREEMENT" transferring Schiold to Sweden. (Paragraph #4 of Exhibit "B").

Case No. A103107 was agreed to as "stayed" pending Schiold's transfer. (Paragraphs #5,6,7, of Exhibit "B").

Explicitly at paragraph #8 (of Exhibit "B"): "Releasor (Schiold) agrees that he will be held in custody by the government of Sweden until January 1, 2007."

Page 5, paragraph #16 (of Exhibit "B"), establishes that: The agreement and settlement, in order to stay the case, was signed by the Supervising Deputy Attorney General, Anya Binsacca, dated 10/22/2003.

Petitioner asserts that the State of California in collusion with the Attorney General's Office and the Board did in fact violate the equal protection clause of the Fourteenth Amendment of the U.S. Constitution, and, California Constitution Article I, Sec. 7(a), by "setting an immutable release date" for Schiold, when his term was set without being found suitable under §3041(b) and going directly to §3041(a).

The language in paragraph #8 of page 3 (of Exhibit "B"), of the "SETTLEMENT AGREEMENT" expressly states that "he will be held in custody of the government of Sweden UNTIL January 1, 2007." Petitioner asserts that this date, January 1, 2007, established a 'term setting' under §3041(a). (Emphasis added).

A foreign national (Schiold) is being treated distinctly different than 'all' U.S. Citizens, and, foreign nationals that have not caused legal actions

1 to enter into "SETTLEMENT AGREEMENTS", in California serving a sentence of life
2 with the possibility of parole. Petitioner is being treated distinctly different
3 than Schiold because he cannot be transferred to another country, and all
4 similarly situated prisoners, thus creating separate and distinct "classes" of
5 inmates for release criteria.

6 The fact that Schiold was found suitable by the Board is irrelevant to the
7 claim herein, as the Governor over-ruled the Board's determination and found
8 Schiold to be unsuitable, which nullified the Board's finding of suitability.
9 See, paragraphs #2,3,6 (of Exhibit "B"). Schiold's term was set at January 1,
10 2007, AND, Schiold does not have to serve any parole time after being released.
11 See, "SETTLEMENT AGREEMENT".

12 The most basic requirement for a claim of violation of equal protection
13 under the Fourteenth Amendment of the U.S. Constitution lies on the issue of
14 non-equal treatment of a "CLASS", or, a showing of separate and/or distinct
15 difference in treatment, both criminally and civilly, among groups or "CLASSES"
16 of persons.

17 The U.S. Supreme Court has established a "class of one" in the case of
18 Village of Willowbrook v. Olech, 528 U.S. 562, 145 L.Ed.2d 1060, 120 S.Ct. 1073
19 (2000) at pp.1074-75: "We granted certiorari to determine whether the Equal
20 Protection Clause gives rise to a cause of action on behalf of a "class of one"
21 where the plaintiff did not allege membership in a class or group." (527 U.S.
22 1067, 120 S.Ct. 10, 144 L.Ed.2d 841 (1999).):

23 "Whether the complaint alleges a class of one or a class of five is
24 of no consequence because we concluded that the number of individuals
in a class is immaterial for equal protection analysis."

25 Our cases have recognized successful equal protection claims brought by
26 a "class of one", where the plaintiff alleges that he/she has been intentionally
27 treated differently from others similarly situated and that there is no rational
28 basis for the difference in treatment. Sioux City Bridge Co., v. Dakota County,

260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); Allegheny Pittsburg Coal Co. v. Commission of Webster City, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). "In so doing, we have explained that 'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its proper execution through duly constituted agents.'" Sioux City Bridge Co., supra, at p.445, 43 S.Ct. 190 (quoting Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352, 38 S.Ct. 495 (1918).)

"It is clearly established that a state violates the equal protection clauses when it treats one set of persons differently from others who are similarly situated." Wheeler v. Miller, 168 F.3d 241, 252 (5th Cir. 1999).

Petitioner has established separate treatment, discrimination, and the Board's failure to follow U.S. Supreme Court precedents, thus their failure to set Petitioner's term, as was done to Schiold, violates both the California and U.S. Constitutions Equal Protection Clauses.

FAILURE TO CONSIDER TERM SETTING

At no time during the hearing(s), nor at any time during Petitioner's incarceration has the Board considered the determinate term that Petitioner would serve, as calculated by Title 15 C.C.R. §2404, (Matrix), or the time he has actually served as factors in the suitability equation. The Court of Appeals in, In re Ramirez, (2001) 94 Cal.App.4th 549, at 569 held:

"The Board cannot ignore the determinate term prescribed for a commitment offense when it considers the gravity of the crime as a factor weighing against a finding of suitability for parole. The Board must make its determination 'in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public.' (P.C. §3041(a).) Determining what would be a 'uniform' term for an inmate serving a determinate term for offenses that include concurrent determinate terms is not an exact science. However, the Board should strive to achieve at least a rough balance between the gravity of the offense, the time the inmate has served, and the sentences prescribed by law for the commitment offense."

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At page 570, the court said:

"The Board must also consider the length of time the inmate has served in relation to the terms prescribed by the Legislature for the offenses under consideration, in order to arrive at a "uniform" term as contemplated by P.C. §3041(a)."

The gravity of Petitioner's offense must be measured not in terms of the life maximum potential, but in relation to the determinate terms prescribed for such offenses in 15 C.C.R. §2403(c). The Board must consider the appropriate determinate term that would be set and the time he has already served. The Board has failed to follow the criteria of §2403(c). (Note: The Board is still in violation by rules and regulations that they are applying.)

FAILURE TO FIX PRIMARY TERM

At no time during Petitioner's incarceration has the Board ever held a hearing to fix Petitioner's 'primary term' on his indeterminate sentence. A 'primary term' is not set in conjunction with or dependent upon a parole hearing. In re Rodriguez, (1975) 14 Cal.3d 639; People v. Scott, (1984) 150 Cal.App.3d 910, 918-19. Petitioner has a right to have his term fixed proportionately to his offense and his culpability.

The Los Angeles County Superior Court, on June 26, 2006, In re Robert Rosenkrantz, Case No. BH003529, attached as (Exhibit "C") to MOTION FOR JUDICIAL NOTICE, specifically at page 3, lines 14-15 establish that the Board set Rosenkrantz term: "On September 9, 1999, petitioner was found unsuitable for parole but the panel set his prison term." A June 30, 2001 date was set for release. (Emphasis added).

Evaluating proportionality does not hinge on the life maximum, but is measuring the time actually served with the sentence deemed appropriate by the Board's sentencing regulations. The Board cannot abdicate this responsibility either by saying it has no authority to fix terms (See, Schiold and Rosenkrantz, supra), or by sub-summing term-fixing under the parole function. Petitioner is

1 entitled to the fixing of his primary term as an ultimate, immutable release
2 date, under the Equal Protection (CLASS OF ONE) of the Fourteenth Amendment.
3 See also, In re Rodriguez, supra; People v. Duran, (1983) 140 Cal.App.3d at
4 502-503; People v. Rodriguez, (1977) 19 Cal.3d 221, 230; Rosenkrants, supra.

5 In McGinnis v. Royster, 93 S.Ct. (1973) the court held, at page 1057 that:

6 "Each inmate has both a 'minimum' parole date, which is the earliest
7 date on which he 'may' be paroled at the discretion of the Parole Board,
8 and a 'statutory release' date which is the earliest date he 'must'
9 be paroled by the Parole Board. (Fn.3), "He also has a maximum
10 expiration date which is the date of the maximum sentence to which
11 an inmate can be held if he receives no good time credits at all."

12 The case refers to an 'indeterminate sentence' and establishes that there
13 are actually three (3) dates to such a sentence; (1) the minimum parole date,
14 (2) the statutory release date, (3) the maximum expiration date (i.e., death).

15 While P.C. §1170 et seq., apply to determinate sentences, the current
16 provisions of P.C. §3041 governing parole for inmates serving indeterminate terms
17 were added as part of the bill enacting the Determinate Sentencing Law, and were
18 intended to serve the same purpose as the determinate sentencing provisions.
19 (Stats., 1976 Ch. 1139, Sec. 281, p.5151; In re Stanworth, (1982) 33 Cal.3d 176,
20 182). Our Supreme Court has made it clear that the 'uniform terms' called for
21 by section §3041(a) are analytically equivalent to determinate sentences imposed
22 under §1170 et seq. (People v. Jefferson, 21 Cal.4th 86, 96).

23 Apparently, the State of California only follows the law and sets a life
24 prisoner's term when it is convenient, to avoid or terminate legal actions (by
25 entering into "SETTLEMENT AGREEMENTS"), or in an arbitrary manner, with no regard
26 to violating due process and equal protection rights under both California and
27 U.S. Constitutional mandated guidelines.
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STATE AND FEDERAL CLAIM NUMBER FOUR (IV)
 THE BOARD VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE
 FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION,
 AND, CALIFORNIA CONSTITUTION ARTICLE I, Sec. 7(a), WHEN THEY
 DENIED PAROLE SUITABILITY BASED ON UNCHANGING FACTORS, i.e.
 HISTORICAL EVENTS, WITHOUT "SOME EVIDENCE", AND APPLYING
 ARBITRARY AND CAPRICIOUS CONCLUSIONS TO BOOTSTRAP A
 PREDETERMINED DENIAL OF SUITABILITY.

Notwithstanding Petitioner's CLAIM NUMBER TWO (II), PAGES 2-6 of this
 petition, also see Superior Court's DENIAL attached hereto, Petitioner asserts
 this 'some evidence' claim.

At page 39 of exhibit "A", the Boards states:

DECISION

"The panel the panel (sic) reviewed all the information received from
 the public and relied on the following circumstances in concluding that
 the prisoner suitable for parole and would not pose unreasonable risk
 of danger to society or threat to public safety if released from prison."

Page 39: "The offense was carried out in a manner that dispassionate
 (sic) and calculated."

Page 39: "The motive was inexplicable in relation to the offense."
 "...used a firearm."

Page 39: "...we find that criminal conduct consists of a juvenile arrest
 in 1957."

Page 39: "With regard to institutional behavior we find that you
 programmed while (sic) in a limited manner while incarcerated."

Page 40: The Panel strongly encourages you to look beyond your current
 education process and look to forms of self-help."

Page 40: "With regard to your other institutional behavior we find that
 there is one 128 counseling chrono, the last of which was in 4/99 and
 one serious 115 that's been recorded in 2/1994."

Page 40: "According to the psychological report in August 2006 by Dr.
 Merek, we find that it is supportive." "The basis of assessing Mr. Dubyak
 as 'lower than the average citizen.'"

Page 40: "This is the one in 2003 from Dr. Steward, where in the
 assessment of dangerousness, item B if release (sic) to the community
 is not (sic) possible to predict the dangerousness since he did not
 discuss the event and the details of the conviction."

Page 41: "With regard to parole plans, we find that you do have
 appropriate residential parole plans." "With regard to employment, the
 Panel notes that you are eligible for Social Security."

Page 41: "These positive aspects of behavior do not outweigh the factors of unsuitability."

3 YEAR DENIAL

Page 41: "In a separate decision, the Hearing Panel finds the prison (sic) has been convicted of murder and it is not reasonable to expect him to that (sic), Page 42: parole to be granted within the next three years." "We come to this conclusion, first and foremost, by the commitment offense." "The offense was carried out in a manner that (sic) dispassionate and calculated manner." "The motive was inexplicable in relation to the offense." "...used a firearm to kill the victim..." "We find that there is criminal conduct that exists with a juvenile arrest in 1957, however that you have programmed in a limited manner while incarcerated." "The panel strongly encourages you to look beyond your current education process and look to other forms of self-help." "There are two incidents of disciplines while incarcerated one a 128 counseling chrono in 4/99 and one serious 115 disciplinary report in 2/1994."

RECOMMENDATIONS

Page 43: "With regard to recommendation, the Panel would recommend that you have no more 115's, 128's and 128(a)s, that you would participate in self-help programs." "I would encourage you that if you do not find a program that are appropriate for you or that you can participate in because you think that limitations that you look to some independent reading in the area of self-help." "And the Panel would accept book reports, some sort of report, two or three paragraphs..."

Petitioner feels it is important to note, the 115 was not classified as "serious" but rather as "administrative" when Petitioner proof of serviced another inmate's legal mail due to prison staff interference with his legal mailings. Secondly, the 1957 alleged arrest, 50 years ago when Petitioner was 14 years old and wrongly entered a dilapidated empty garage while riding a bicycle down an alley, true, Petitioner had no right what so ever to enter the garage but there is no nexus establishing how this 50 year old historical relic supports a denial of suitability.

The Superior Court's scathing denial, attached hereto:

SUPERIOR COURT'S DENIAL

"Based on the evidence before it, the panel concluded that petitioner poses an unreasonable risk of danger to society if released. (The transcript says the opposite but it is clear from the context what was meant)."

"Petitioner's calculating nature, coupled with his persistent denial

1 of culpability, and his stubborn refusal to program as directed by the
 2 eligibility board would give any reasonable person a deep concern that
 3 Petitioner might harm others if the circumstances justified it, to his
 4 mind." (Emphasis added).

5 During Petitioner's trial he was offered a 'manslaughter' plea bargain, twice,
 6 and acceptable by the trial judge, Petitioner chose to exercise his constitutional
 7 right to a trial and was subsequently convicted, 21 years later he is still being
 8 punished by the Board and trial court for claiming his innocence, see also P.C.
 9 §5011(a)(b). Understanding that Petitioner is only a 'threat' to the public because
 10 he did not plead guilty. The trial judge and prosecutor have established over
 11 21 years ago, that Petitioner was not a threat to society within the intent of
 12 P.C. §3041(a)(b) because he would have been back among society over 18 years ago.

13 There are only two (2) excuses given in the superior courts denial;
 14 Petitioner's "persistent denial of culpability", and, his "stubborn refusal to
 15 program as directed." Obviously a failure in the "some evidence" arena.

16 DISPASSIONATE AND CALCULATED

17 Title 15, C.C.R. §2402(c); Unsuitability criteria factors. At (B): The offense
 18 was carried out in a dispassionate and calculated manner, such as an execution
 19 style murder. Petitioner was not charged with, tried for nor convicted of an
 20 "execution style murder" thus this section and wording cannot be applied to his
 21 commitment offense.

22 Courts must ensure that the evidence relied on by the Board in meeting the
 23 'some evidence' standard is both reliable and of a solid value. (Rosenkrantz,
 24 29 Cal.4th 616 at 655; see C.C.R. §§2402(b), 2281(b); see also In re Scott (2005)
 25 133 Cal.App.4th 573, 591.) It is not sufficient for the Board to derive findings
 26 from a silent or misconstrued record.

27 The Board labeled Petitioner's commitment offense as "dispassionate and
 28 calculated", "motive was inexplicable", without explaining how it went beyond
 the usual callousness inherent in the crime of murder. (In re Smith, 114

1 Cal.App.4th at pp.365-366). Absent such an explanation, the Board's finding
2 violated the "some evidence" standard by failing to support the finding with
3 evidence in the record. (Id., at p.667).

4 When reviewing the Board's decision, "[t]he test is not whether some evidence
5 supports the reasons ... for denying parole, but whether some evidence indicates
6 a parolee's release unreasonably endangers public safety." (In re Lee (2006) 143
7 Cal.App.4th 1400, 1408.)

8 INEXPLICABLE MOTIVE

9 Regarding the Board's statement that "The motive was inexplicable in relation
10 to the offense." As was observed in Scott I, 119 Cal.App.4th at p.892, "An
11 'inexplicable' motive, as we understand it, is one that is unexplained or
12 unintelligible, as where the commitment offense does not appear to be related
13 to the conduct of the victim[s] and has no other discernible purpose. A person
14 whose motive for a criminal act cannot be explained or is unintelligible is
15 therefore unusually unpredictable and dangerous." (Id. at p.893). Barker's motive
16 was not "inexplicable" under this definition.

17 Similarly, the record does not indicate that Barker's motive was "very trivial
18 in relationship to [his] offense." (§2281(c)(1)(E).) "The offense committed by
19 most prisoners serving life terms is, of course, murder. Given the high value
20 our society places upon life, there is no motive for unlawfully taking the life
21 of another human being that could not reasonably be deemed 'trivial'. The
22 Legislature has foreclosed that approach, however, by declaring that murderers
23 with life sentences must 'normally' be given release dates when they approach
24 their minimum eligible parole dates... (Scott I, 119 Cal.App.4th at p.893).

25 SELF-HELP BOOK REPORTS

26 At page 40 of Exhibit "A"; "The panel strongly encourages you to look beyond
27 your current education process and look to forms of self-help", again at page
28 43: "And the Panel would accept book reports, some sort of report, two or three

1 paragraphs...", also eloquently stated by the superior court: "...and his stubborn
2 refusal to program as directed by the eligibility board..."

3 Although worded as an 'encouragement' to Petitioner it is only meant as
4 another hoop to jump through for an excuse to bolster a predetermined denial
5 without even taking the most basic steps to ensure that the prison library does
6 in fact have self-help books available. Even if one could figure out how writing
7 "two or three paragraphs" would make him a less danger to public safety regardless
8 of the fact that the clinical psychologist made no such finding for self-help
9 in his observations, defies common sense and logic.

10 A plethora of very recently issued California state and district court
11 decisions uniformly holds that evidence of even particularly egregious facts of
12 commitment offenses is not tantamount to evidence of undue current parole risk
13 absent articulation of a nexus between those entities. *Willis v. Kane*, 485
14 F.Supp.2d 1126, 1135 (N.D. Cal. 2007) ["Notwithstanding the terrible nature of
15 the crime, the critical question the BPH was supposed to decide at the parole
16 suitability hearing was whether 'consideration of the public safety requires a
17 more lengthy period of incarceration for this individual' ... Willis' 1983 crime
18 did not provide sufficient evidence to find him unsuitable for parole in 2003"];
19 *Martin v. Marshall*, 431 F.Supp.2d 1038, 1049 (N.D. Cal. 2006); *Blankenship v.*
20 *Kane*, 2007 WL 1113798 at *10 (N.D. Cal. 2007) ["...the California regulations
21 require ... some evidence that the prisoner poses a present danger to society
22 ... continued reliance over time on an unchanging factor ... the commitment offense
23 ... does not provide evidence of a present danger to society"]; *Thomas v. Brown*,
24 2006 WL 3783555 at *6 (N.D. Cal. 2006) [not some evidence that the murder shows
25 current parole unsuitability]; *Rosenkrantz v. Marshall*, 444 F.Supp.2d 1063, 1086
26 (C.D. Cal. 2006) ["the facts surrounding petitioner's crime no longer amount to
27 'some evidence' supporting the conclusion that petitioner would pose an
28 unreasonable risk of danger if released on parole"]. State cases: In re Scott,

1 133 Cal.App.4th at 595 ["the commitment offense can negate suitability only if
2 circumstances of the crime ... rationally indicate that the offender will present
3 an unreasonable public safety risk if released from prison"]; In re Elkins, 144
4 Cal.App.4th at 496, 499 ["Thus, a governor, in reviewing a suitability
5 determination, must remain focused not on circumstances that may be aggravating
6 in the abstract but, rather, on facts indicating that release currently poses
7 'an unreasonable risk of danger to society'"]; In re Lee, 143 Cal.App.4th at 1413
8 ["... the board and Governor must focus their parole decisions on whether a
9 prisoner continues to pose an unreasonable risk to public safety ..."]; see also
10 In re Lawrence, 150 Cal.App.4th 1511, 1554-1556 (2007); In re Gray, 151 Cal.App.4th
11 379 (2007); In re Barker, 151 Cal.App.4th 346, 375-377 (2007).

12 The Board deemed Petitioner unsuitable for parole (absent CLAIM NUMBER TWO)
13 by reciting several of the sub-factors listed under Title 15 C.C.R. §2402(c)(1)
14 describing the commitment offense as being "carried out in a manner that
15 dispassionate (sic) and calculated", "The motive was inexplicable in relation
16 to the offense."

17 These factors are sub-categories listed under the heading of a murder
18 committed "in an especially heinous, atrocious, or cruel manner." (15 C.C.R.
19 §2402(c)(1).) The Board copied the language from Cal. Penal Code §190.2, a "special
20 circumstances" applicable only to particularly egregious first degree murders
21 punishable by the "death penalty or life imprisonment without parole." Sub-section
22 (a)(14) of the special circumstances statute, Cal. P.C. §190.2, reads, "the murder
23 was especially heinous, atrocious, or cruel" which, the statute explains, means
24 "manifesting exceptional depravity ... a conscious or pitiless crime that is
25 unnecessarily tortuous to the victim."

26 Accordingly, the Board deemed Petitioner a current unreasonable risk to public
27 safety by arbitrarily and capriciously characterizing his commitment offense as
28 a premeditated special circumstance first-degree murder.

1 In *Irons v. Carey*, 479 F.3d 658 (2001), the Ninth Circuit's third in a trilogy
2 that includes *Biggs* and *Sass* addressed the issue whether, consistent with due
3 process, the immutable facts of commitment offenses may be employed repeatedly
4 or interminably to preclude the parole of one like Petitioner who indisputably
5 satisfies all parole requirements, has been psychologically evaluated to pose
6 no parole risk and has served 28 years (inclusive of earned credits).

7 The court held that the BPH panel's use of Iron's crime, a particularly
8 egregious murder, before he had served the minimum prison term imposed by the
9 trial court, satisfied the "some evidence" test sufficiently to uphold the BPH
10 panel's decision finding that Irons was unsuitable for parole. The court focused
11 on Irons' egregious murder: he fired 12 rounds into the victim, then, when he
12 found the victim was still alive, stabbed him twice. After leaving the corpse
13 in a sleeping bag for 10 days, Irons removed and weighted it, and dropped it in
14 the ocean.

15 The court emphasized that Irons, like *Sass* and *Biggs* before him, had not
16 served "the minimum number of years to which they had been sentenced at the time
17 of the challenged parole denial by the Board." The court explained, contrary to
18 the Board's notion, why *Biggs* was not overturned by *Sass*, and re-emphasized that
19 continued use of the commitment offense facts to find such an inmate unsuitable
20 for parole may constitute a due process violation after the minimum term has been
21 served:

22 "We note that in all the cases in which we have held that a parole
23 board's decision to deem a prisoner unsuitable for parole solely on
24 the basis of his commitment offense comports with due process, the
25 decision was made before the inmate had served the minimum number of
26 years required by his sentence. Specifically, In *Biggs*, *Sass*, and here,
27 the petitioners had not served the minimum number of years to which
28 they had been sentenced at the time of the challenged parole denial
by the Board. [] All we held in those cases and all we hold today,
therefore, is that, given the particular circumstances of the offenses
in these cases, due process was not violated when these prisoners were
deemed unsuitable for parole prior to the expiration of their minimum
terms." (*Irons v. Carey*, *supra*, at 664-665).

1 Under the Irons standard, at the time of Petitioner's 2006 parole hearing,
2 his second, at age 65, he had served (including jail time and earned credits)
3 twenty eight (28) years in prison, 11 years more than the minimum and at the
4 maximum in the Matrix.

5 A district court recently elaborated on Iron's reasoning:

6 "Another critical difference between this case and Biggs, Sass and Irons
7 is that Brown has served a substantial amount of time beyond the minimum
8 sentence. This court must consider that at some point after an inmate
9 has served his minimum sentence the probative value of his commitment
10 offense as an indicator of "unreasonable risk of danger to society"
11 recedes below the "some evidence" required by due process to support
a denial of parole. See, Irons, 479 F.3d at 665. A decision to revoke
parole based solely on an inmate's commitment offense that can no longer
be considered probative of dangerousness to society would be arbitrary
and not comport with the "some evidence" standard. See Hill, 472 U.S.
at 545-55, 457. This is one of those cases..."

12 The wording of "minimum term" is being mis-applied. Under California law
13 an indeterminately sentenced inmate, like Petitioner, must be granted parole at
14 his initial hearing or no later than at his first subsequent hearing at which
15 his parole no longer poses an unreasonable risk of danger to public safety, Cal.
16 P.C. §3041; 15 C.C.R. §§2401, 2402(a). The 'initial' hearing occurs one year before
17 the inmate's minimum eligible parole date (MEPD) (Ibid.), "the earliest date on
18 which an ISL or life prisoner may be legally released on parole" (15 C.C.R.
19 §2000(b)(67)), which in Petitioner's case was August 30, 2003 (one year prior
20 to the MEPD).

21 The Board appears to only take into consideration "earned credits" after
22 the inmate is found suitable, then a date is calculated which is always far past.
23 This act defies logic and common sense because the MEPD date is based on earned
24 credits of 1/3rd time, i.e., Petitioner was sentenced to 25 years to life plus
25 a 2 year gun enhancement, thus 27 years to life, less earned credits establish
26 a minimum sentence of 18 years. (See Proposition 7 of 1978).

27 In, In re Ramirez, Marin County Superior Court, Case No. SC109829A (9-13-
28 2000), (94 Cal.App.4th 549), the court held that parole could not be withheld

absent a factual finding that the offense was "particularly egregious."

To re-iterate a fact, Petitioner asserts that the Board's DECISION never even addressed the wording of "particularly egregious" and with the understanding of Ramirez, supra, that, reasonably interpreted, a factual finding of "particularly egregious" must be found to deny a parole date. See also, In re Rosenkrantz, 29 Cal.4th 616, 683, 128 Cal.Rptr.2d 104, 161 (2002)

PSYCHOLOGICAL EVALUATION

The facts at issue regarding the psychological evaluation are that the report is prepared by a state licensed, expert in his field, professional psychiatrist/psychologist with years of formal education and training with the ability to make sound judgments regarding an inmate's "potential" for "future violence" thus a threat or risk level assessment of current risk to public safety.

The Commissioners however have no such formal training, and none is established in Exhibit "A", or rather the lack of existence in the record that the Commissioners have a modicum of psychiatric knowledge or training, lacking professional credentials as a board certified expert or even at the level of knowledge required for a CDC Correctional Counselor as set forth in the Department of Corrections Operational Manual, at §62090.14.1 requiring staff to have at least two (2) years of "graduate training in psychiatry" to make an evaluation for an inmate. When the Board over-rides or contravenes a Psychological Evaluation without "some evidence" to support their "re-evaluation" they are indeed practicing medicine without a license under California law.

The Psychological Evaluation Report is 'always' over-ridden and/or contradicted by the Board when the evaluation is favorable to an inmate for suitability of release on parole. The Board, nearly always, requires "selfhelp, book reports, AA, NA, and/or anger management in spite of what the Evaluation states or rather what is not recommended by the psychologist making the evaluation.

Exhibit "D", under 'XI': "If paroled, he plans to live with his sister and

1 collect Social Security. The prognosis for successful, responsible, legal,
2 prosocial community is good." (Emphasis added).

3 At 'XII': "He exhibited no depressive or psychotic symptomatology. His
4 intellectual functioning was estimated to be in the average range. He was calm,
5 cooperative and alert. His mood affect and flow of thought were all normal. His
6 insight and judgment were good. He is not currently in need of any mental health
7 treatment." (Emphasis added).

8 At 'XIV': "...his violence potential is lower than the average citizen."

9 At 'XV': "He does not have a mental health disorder that would necessitate
10 treatment either while incarcerated or on parole." "There are no obvious mandatory
11 conditions of parole and recommendations."

12 The Board cannot legally apply 15 C.C.R. §§2400-2411 to over-ride or control
13 the legislative intent of Cal. P.C. §3041. See, *Aerolineas Argentinas v. U.S.*,
14 77 F.3d 1564 (Fed. Cir. 1996).

15 When an administrative regulation conflicts with a statute, the statute
16 controls. (Government Code §11342.2). Petitioner asserts that §§2400-2411 rules
17 and regulations are in direct conflict with P.C.'s §3041 et seq., wherein §3041
18 only carries one basic requirement for a parole release date, i.e.,, consideration
19 of public safety. Although the Board may use 'all' available information to arrive
20 at their decision the intent of the penal code still controls and the Board cannot
21 change, add to or delete the requirements for parole release suitability, an issue
22 already decided (threat level assessment) by a state certified Psychiatrist.

23 An agencies regulations cannot legitimate the violations of constitutional
24 or statutory rights. *U.S. v. Marolf*, 173 F.3d 1213 (9th Cir. 1999). No other
25 excuses/reasons given by the Board for denial of suitability are legally valid.

26 The Board has effectively amended P.C. §3041(a)(b) and the legislative intent
27 has been circumvented. Proposition 7, 1978, did not allow such amendment without
28 voters approval. See, *In re Oluwa*, (1989) 207 Cal.App.3d 447.

UNCHANGABLE CIRCUMSTANCES

Greenholtz, supra, spoke in detail about the purpose of parole being rehabilitation and, most important, recognized that an inmate's record during confinement indicates whether release on parole is appropriate. Therefore, even in the absence of Ninth Circuit case law clarifying the scope of Biggs, Greenholtz is still compelling law.

The facts of the unchanged circumstances must indicate a present danger to the community if released, and this can only be assessed not in a vacuum, after four or five eligibility hearings, but counterpoised against the backdrop of prison events. *Bair v. Folsom State Prison*, 2005 WL 2219220, *12 n.3 (E.D. Cal. 2005), report and recommendation adopted by, 2005 WL 3081634 (E.D. Cal. 2005).

In *Irons v. Warden of California State Prison-Solano*, 358 F.Supp.2d 936, 947 (E.D. Cal. 2005) the court asks rhetorically:

"What is it about the circumstances of petitioner's crime or motivation which are going to change? The answer is nothing. The circumstances of the crimes will always be what they were, and petitioner's motive for committing them will always be trivial. Petitioner has no hope for ever obtaining parole except perhaps that a panel in the future will arbitrarily hold that the circumstances were not that serious or the motive was more than trivial. Given that no one seriously contends lack of seriousness or lack of triviality at the present time, the potential for parole in this case is remote to the point of non-existence. Petitioner's liberty interest should not be determined by such an arbitrary, remote possibility."

The court's holding that the Board's use of unchanging factors to deny parole is in violation of due process. *Rosenkrantz v. Marshall*, 444 F.Supp.2d, 1063 (C.D. Cal. 2006).

RECIDIVISM STUDIES

The purpose of this information is to bring to the court's attention of studies done several years ago regarding recidivism rates among inmates that the Board appears to ignore, given the no parole policy due to alleged threat or risk level to the public safety, always used by the Board and/or governor as excuses for parole suitability denials, at the current rate of 99% denials, I submit the

1 following information.

2 * * * * *

3 "Studies of parole success repeatedly indicate that those who commit murder
4 are among the best parole risks." Allen, Eldridge and Latessa, Vito, Probation
5 and Parole in America, p.254, 1985, citing Niethercut, 1972. Both with regard
6 to the commission of felonies in general and the crime of homicide, no other
7 offender has such a low rate of recidivism. Bedau, Hugo Adams, The Death Penalty
8 in America, 3rd Ed., p.180, n.3, 1980. "Paroled murderers actually present some
9 of the best parole risks." Bedau, Hugo Adams, The Death Penalty in America, 3rd
10 Ed., p.180, n.3, 1980, citing NCCD newsletter, Uniform Parole Reports, 1972, p.2.
11 "Compared with other groups, murderers are actually the best parole risks." Bedau,
12 Hugo Adams, The Death Penalty in America, 3rd Ed., p.180, n.3, citing Stanton
13 p.149, 1969. Two studies indicated that only three (3) in 10,000 and six (6) in
14 10,000 convicted of murder commit another crime. Bedau, Hugo Adams, The Death
15 Penalty in America, 3rd Ed., pp.176-179, 1980. After conducting a study for the
16 California Board of Prison Terms (1983-1987) it was concluded that no one released
17 after committing a murder had been returned to prison for murder. Ellwood, Eldridge
18 T., PH.D, Research Projects On Life Prisoners, p.3, April 1989, California BPT.
19 "As a matter of statistical probability, murderers released from a prison are
20 far less likely to commit a new crime than any other category of offender." Orland,
21 Leonard, Justice, Punishment, Treatment, p.425, 1973. "Many murderers could be
22 released immediately after conviction with little likelihood of offending again."
23 Von Hirsh, Andrew, Doing Justice, Report On The Committee For The Study Of
24 Incarceration, p.126, 1976. These authorities, from some of the most respected
25 sociologists in our country, reveal the fallacy of assumptions regarding the
26 dangerousness of those convicted of murder.

27 In reference to a murder case: Hending v. Smith, 781 F.2d 850 (11th Cir.
28 1986) ["[I]t is a matter of general knowledge that except for professional killers,

1 few people commit more than one murder in a life time. It is a crime involving
2 a specific interpersonal crisis, and not a habitual offense."]; Rosenkrantz, 444
3 F.Supp.2d 1063, 2006 WL 2327085 at *12-17.

4 //

5 //

6 //

STATE AND FEDERAL CLAIM NUMBER FIVE (V)

THE STATE OF CALIFORNIA HAS CREATED A MORE COMPREHENSIVE RIGHT FOR ITS RESIDENTS THAN THE FEDERAL GOVERNMENT FOR THE APPLICABLE EVIDENCE STANDARD APPLIED TO PAROLE SUITABILITY HEARINGS UNDER CALIFORNIA EVIDENCE CODE Sec. §115 HEREIN.

The Board of Prison Hearings has violated Petitioner's due process and equal protection rights under the Fourteenth Amendment of the U.S. Constitution, and, California Constitution Article I, Sec. 7(a), a right created by the Legislature of California and by its intent to create an evidence code (§115) that creates a minimal standard of 'evidence' requirement for all situations.

'Some evidence', as applied by the Board, and, used as a judicial tool to review the Board's decision for due process violations, is not the legal standard, especially under California law, see Evidence Code §115; also, U.S. Supreme Court precedents, herein asserted, establish that "preponderance of evidence" is the legal (minimum) evidence standard for parole suitability hearings and not the defunct 'some evidence' standard relied upon by either the Board, and/or Governor. Although the courts do rely on "some evidence" to determine if there is any evidence in the Board's denials (records) it must be "some evidence" that a "preponderance of evidence" exists in the record to support a denial.

The U.S. Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2651, 159 L.Ed.2d 578 (2004) stated that:

"As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof."

The Court further explains that:

"It primarily has been employed by courts in examining an administrative record developed after an adversarial process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting." See, e.g., Hill, 472 U.S., at 455-457, 105 S.Ct. 2768.

The Hamdi court further explains that: "...for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty or property, without due process of law," U.S. Const. Amdt. 5, is the test that

1 we articulated in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d
2 18, (1976):

3 "We agree with the prevailing view and conclude that Hill addressed
4 only the appropriateness of 'some evidence' as a standard of appellate
5 review, not as a standard of proof. Therefore, we now seek to determine
6 through our own analysis the appropriate fact-finding standard to be
7 used by the DOC. To determine whether a standard of proof in a
particular type of proceeding satisfies due process, the Supreme Court
has prescribed a three-factor test that examines: (1) the private
interest affected, (2) the risk of erroneous deprivation of such
interest, and (3) the government's interest."

8 In Carrillo, Supreme Court of Minnesota, 710 N.W.2d 763, 2005 Minn. LEXIS,
9 424, Filed July 28, 2005, that court relied on *Eldridge* and *Hamdi* and held that:

10 "Taking the Supreme Court's three factors into consideration, we
11 conclude that the "some evidence" standard is inappropriate for use
12 by the DOC at the fact-finding level. We conclude that the
13 "preponderance of evidence" standard better protects against an
14 erroneous deprivation of an inmate's liberty interest in his supervised
15 release date and does not pose an unacceptable burden on the DOC.
16 Therefore, we conclude that a DOC hearing officer must find by a
preponderance of evidence that Carrillo has committed a disciplinary
offense before the commissioner can extend the date of his supervised
release. Accordingly, we hold that the district court and the court
of appeals erred when they denied Carrillo's petition for writ of habeas
corpus."

17 The State of California, by Legislative intent, has conferred more, or a
18 greater, evidence standard upon the Board, and Governor's review, (and judicial
19 review), by making the 'minimum' evidence standard "preponderance of evidence",
20 rather than that espoused in *Hill*, i.e., "some evidence". See also, *Jurasek v.*
21 *Utah State Hospital*, 158 F.3d 506 (10th Cir. 1998), "The state may confer more
22 comprehensive due process protection upon its citizens than does the federal
23 government."

24 Petitioner contends that a reasonable understanding of the holding in *Hamdi*
25 *v. Rumsfeld*, relied upon in *Carrillo*, *supra*, *Eldridge*, *supra*, is that a court
26 will apply the "some evidence" standard to review records, of both the Board's
27 and Governor's denials for suitability of parole, to see if there was proof under
28 the "preponderance of evidence" standard mandated by California Evidence Code

1 Sec. §115, not, that the record of the Board's, or Governor's, denial of
2 suitability, decision only requires "some evidence" of proof, as is always applied
3 by the Board for denial, and, by the Governor for review.

4 Petitioner's due process rights were violated when the defunct minimally
5 necessary evidence (some evidence) standard was applied in place of preponderance
6 of evidence as is mandated by California Evidence Code section §115, second
7 paragraph; "Except as otherwise provided by law, the burden of proof requires
8 proof by a preponderance of the evidence."), and U.S. Supreme Court precedents
9 herein listed.

10 Thus, the Hill, supra, "some evidence" standard is being applied to
11 circumvent and over-ride the California Constitutions duly elected Legislatures
12 intent to confer a greater due process protection upon its citizens when they
13 enacted Evidence Code §115 (Preponderance of evidence as the minimal standard
14 of proof or review) than does the federal courts Hill standard of "some evidence".

15 //

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17 //

CONCLUSION

It is established in the Psychological Evaluation that Petitioner is not a current threat or risk to public safety. There was no evidence either under the "some evidence" "modicum of evidence" or any other evidence standard to support the denial of suitability, nor was there any evidence to support the Board's requirement for book reports under the guise of self-help as a requisite to suitability.

Petitioner was entitled to a term setting under his equal protection "class of one" claim at his first (initial) hearing.


The Board's predetermined denial was arbitrary and capricious and fails 'any' evidence test to support the denial.

Remanding Petitioner back to the Board for another pre-determined denial would be fruitless as is obvious to the courts that the Board does not follow direction or constructive criticism in various court orders, nor does the Board follow the intent of California Penal Codes and defies the California and U.S. Constitution with impunity.

The only alternative is for this court to issue and order to the Board to set Petitioner's release date as required by law. See, In re Scott, 133 Cal.App.4th at pp.603-604 [ordering immediate release instead of remand where no evidence supported denying parole].

Respectfully submitted,

1-16-2008


Samuel A. Dubyak

PRAYER FOR RELIEF

Wherefore, Petitioner respectfully requests that this Court declare/order that:

1). Respondents show cause why Petitioner is not entitled to the relief requested:

2). The Board set a release date consistent with Title 15 C.C.R. 'Matrix' and as is established in P.C. §3041(a):

3). There was no evidence in the record to deny Petitioner a release date and/or uniform term setting after being found suitable and would not pose a risk to public safety:

4). The Board's denial of a release date was arbitrary and contrary to P.C. §3041(a)(b) language:

5). The Board set Petitioner's term as was done to Schiold and Rosenkrants (Claim No. III):

6). If the Board fails to set a parole release date and/or uniform term under Petitioner's Claims No. TWO and THREE, that this Court issue an order for Petitioner's release forthwith:

7). The Boards decision on October 24, 2006 became final 120 days after, per P.C. §3041(b):

8). Petitioner's release date and/or uniform term date become effective on October 24, 2006:

9). Grant Petitioner such other relief as this Court deems just and proper in the interest of justice as Petitioner is a layman at law.

//

//

//

Samuel A. Dubyak D-54700
 Box 689 C-115L
 California State Prison
 Soledad, CA 93960-0689

Petitioner, in pro se

IN THE SUPERIOR COURT OF CALIFORNIA
 FOR THE COUNTY OF SAN BERNARDINO

SAMUEL A. DUBYAK,

Petitioner,

v.

CURRY, Warden,

Respondent.

Case No. _____

MOTION/REQUEST FOR JUDICIAL NOTICE

To: THE HONORABLE JUDGE(S) OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO.

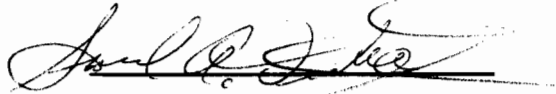
Pursuant to California Evidence Code sections 451 subdivision (a), 452 subdivision (a), (c) & (d), and 459 subdivision (a), Commode Home System, Inc. v. Superior Court, (1982) 32 Cal.3d 211, 218-219, and, Adamson v. Zipp, (1984) 163 Cal.App.3d Supp. 1, n.17, Petitioner hereby asks this Court to take "Judicial Notice" of the documents submitted and currently attached to the herein petition as the following listed exhibits: "A", Parole Board suitability hearing transcripts, "B" designated as "SETTLEMENT AGREEMENT, Re, Schiold, "C" designated as an order, Re, Rosenkrantz, "D" designated as Petitioner's Psychological Evaluation.

This Court must take Judicial Notice of the factual findings of other courts, and this court's previous orders, even though the Court need not accept the truth of those findings. See, Mack v. State Bar of California, (2001) 92 Cal.App.4th

1 957, 961, rehearing denied, review denied; Duggal v. G.E. Capitol Communications
2 Service, Inc., (2000) 81 Cal.App.4th 81, 82; People v. Moore, (1997) 59 Cal.App.4th
3 168, 178.

4 Petitioner has obtained the above mentioned documents from the prison law
5 library and from the Swedish Consulate's office, (through another inmate Petitioner
6 assisted). All of the attached cases arose out of habeas corpus proceedings in
7 the aforementioned Courts. Review of the attached cases will assist this Court
8 in evaluating the claims presented in Petitioner's habeas corpus petition along
9 with this MOTION/REQUEST FOR JUDICIAL NOTICE.

10 Respectfully submitted,

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14 Samuel A. Dubyak
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EXHIBIT

A

FILED

JUL 05 2007

LISA M. GALDOS
CLERK OF THE SUPERIOR COURT
DEPUTY

S. GARSIDE

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY

In re) Case No.: HC 5740
)
Samuel A. Dubyak) ORDER
)
On Habeas Corpus.)

On May 29, 2007, Petitioner Samuel A. Dubyak filed a petition for writ of habeas corpus.

Petitioner is currently incarcerated at the Correctional Training Facility (CTF) in Soledad.

Petitioner describes the background of the petition as follows.

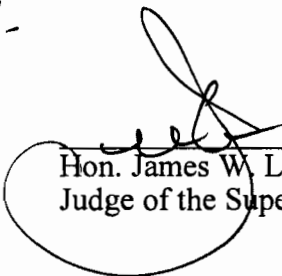
On October 24, 2006, Petitioner's second parole suitability hearing was held. To date, Petitioner has not received a copy of the transcript from this hearing.

Pursuant to California Rules of Court, 4.551(b), the court requests an informal response from the Attorney General's Office (Respondent). The informal response should address when Petitioner will receive a copy of his parole suitability hearing transcript.

The informal response shall be filed within 15 days from the date of service of the order. Petitioner may file a reply within 15 days from the date of service of the informal response upon Petitioner.

IT IS SO ORDERED.

Dated: July 5, 2007.


Hon. James W. Luther
Judge of the Superior Court

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
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Facsimile: (415) 703-5843
E-Mail: Stacey.Schesser@doj.ca.gov

July 20, 2007

The Honorable James W. Luther
Monterey County Superior Court
P.O. Box 1051
Salinas, CA 93902-0414

RE: INFORMAL RESPONSE
In re SAMUEL A. DUBYAK, Case No. H5740

Dear Judge Luther:

This letter is written pursuant to the court's request for an informal response to inmate Samuel Dubyak's petition for writ of habeas corpus. Petitioner Dubyak is a California state inmate at the Correctional Training Facility (CTF) who alleges that he has not received a copy of the transcript from his parole consideration hearing held on October 24, 2006. (Petn.) Petitioner's claims, however, are moot.

As a general principle, it is the duty of a court to decide only "actual controversies" by judgments which can be carried into effect. Courts must avoid rendering opinions on moot questions, abstract propositions, or declaring rules of law which cannot affect a matter at issue in a pending case. (*National Association of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746.) "[A]lthough a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character, it becomes a moot case or questions which will not be decided by the court." (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.)

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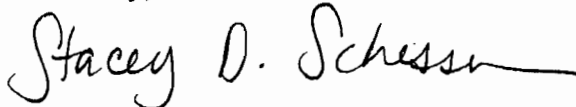
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James W. Luther
July 20, 2007
Page 2

Attached to this informal response is a copy of Dubyak's October 24, 2006 parole consideration hearing. (Exh. 1 – Parole Consideration Hearing Transcript.) Given that Dubyak will receive a copy of this informal response and the attached exhibit upon service, he will have the parole consideration hearing transcript he requested. Because Dubyak already received the relief requested, this court can no longer grant relief and respondent requests the petition be dismissed.

Sincerely,

A handwritten signature in black ink that reads "Stacey D. Schesser". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

STACEY D. SCHESSER
Deputy Attorney General
State Bar No. 245735

For EDMUND G. BROWN JR.
Attorney General

SDS:ls

Attachments: Exhibit 1

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Dubyak**

No.: **H5740**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 20, 2007, I served the attached

INFORMAL RESPONSE

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Samuel A. Dubyak
D-54700
Correctional Training Facility
P.O. Box 689, D-115L
Soledad, CA 93960-0689
in pro per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 20, 2007, at San Francisco, California.

L. Santos

Declarant

L. Santos

Signature

SUBSEQUENT PAROLE CONSIDERATION HEARING

STATE OF CALIFORNIA

BOARD OF PAROLE HEARINGS

In the matter of the Life)
Term Parole Consideration)
Hearing of:)

CDC Number D-54700

SAMUEL DUBYAK)
_____)

CORRECTIONAL TRAINING FACILITY

SOLEDAD, CALIFORNIA

OCTOBER 24, 2006

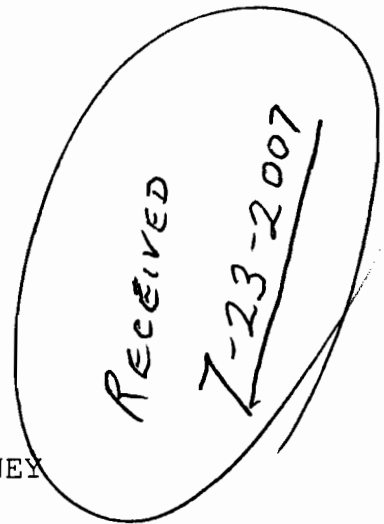
1:30 P.M.

PANEL PRESENT:

JAMES DAVIS, PRESIDING COMMISSIONER
NOREEN BLONIEN, DEPUTY COMMISSIONER

OTHERS PRESENT:

SAMUEL DUBYAK, INMATE
PETER FERGUSON, ATTORNEY FOR INMATE
JENNIFER DAWSON, DEPUTY DISTRICT ATTORNEY



CORRECTIONS TO THE DECISION HAVE BEEN MADE

____ No
____ Yes

See Review of Hearing
Transcript Memorandum

Beth Lewis

Northern California Court Reporters

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PROCEEDINGS

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DEPUTY COMMISSIONER BLONIEN: We are on record.

PRESIDING COMMISSIONER DAVIS: This is a subsequent parole consideration hearing for Samuel Dubyak.

INMATE DUBYAK: Yes, sir.

PRESIDING COMMISSIONER DAVIS: Am I pronouncing that correctly?

INMATE DUBYAK: Yes, sir.

PRESIDING COMMISSIONER DAVIS: CDC number D-54700. Today is date is October 24, 2006 and we're located at CTF in Soledad. The inmate was received on April 23, 1987 from San Bernardino County. The life term beginning on April 23, 1987 with a minimum eligible parole date of August 31, 2004. The controlling offense for which the inmate has been committed is murder first with use of a firearm. Case number CR12056, count one Penal Codes Section 187/12022.5 for which he received a term of 25 years to life plus two. This hearing is being tape recorded so for the purpose of voice identification we'll each state our first and last name, spelling our last name. And when it reaches you Mr. Dubyak if you'll also give us your CDC number, please sir. I'll start and move to my left, I'm James Davis, D-A-V-I-S, Commissioner.

DEPUTY COMMISSIONER BLONIEN: I'm Noreen Blonien,

1 B-L-O-N-I-E-N, Deputy Commissioner.

2 **DEPUTY DISTRICT ATTORNEY DAWSON:** Jennifer
3 Dawson, D-A-W-S-O-N, Deputy District Attorney, San
4 Bernardino County.

5 **ATTORNEY FERGUSON:** Peter Ferguson,
6 F-E-R-G-U-S-O-N, counsel for Mr. Dubyak.

7 **INMATE DUBYAK:** Samuel Dubyak, D-U-B-Y-A-K.

8 **PRESIDING COMMISSIONER DAVIS:** And your CDC
9 number?

10 **INMATE DUBYAK:** Oh sorry, D-54700.

11 **PRESIDING COMMISSIONER DAVIS:** Very well thank
12 you, and let the record reflect that we are joined today
13 with two correctional officers who are here for security
14 purposes and will not be actively participating in the
15 hearing. Mr. Dubyak, in front of you in that laminated
16 piece of paper is the American's with Disabilities Act,
17 will you please read that aloud?

18 **INMATE DUBYAK:** "The Americans with
19 Disabilities Act, ADA, is a law to help
20 people with disabilities. Disabilities
21 are problems that make it harder for some
22 people to see, hear, breathe, talk, walk,
23 learn, think, work or take care of
24 themselves than it is for others. Nobody
25 can be kept out of public places or
26 activities because of disabilities. If
27 you have a disability you have the right

1 to ask for help to get ready for your BPT
2 Hearing, get to the hearing, talk, read
3 forms and papers, and understand the
4 hearing process. BPT will look at what
5 you ask for to make sure that you have a
6 disability that is covered by ADA, and
7 that you have asked for the right kind of
8 help. If you do not get help or if you
9 don't think you got the kind of help you
10 need, ask for a BPT Form 1074 grievance
11 form, you can also get help to fill it
12 out."

13 **PRESIDING COMMISSIONER DAVIS:** Very well, thank
14 you. Our records indicate that on May 10, 2006 that
15 together with staff at the institution on November 18,
16 2005 you reviewed and signed a BPT form 1073 indicating
17 that you do not have any disabilities that would
18 qualifying under the American's with Disabilities Act, is
19 that correct?

20 **INMATE DUBYAK:** That is correct.

21 **PRESIDING COMMISSIONER DAVIS:** Has anything
22 changed since that time?

23 **INMATE DUBYAK:** No.

24 **PRESIDING COMMISSIONER DAVIS:** And you were able
25 to read that without glasses, do you normally need
26 glasses?

27 **INMATE DUBYAK:** I'm blind in my right eye, that's

1 why I move it back and forth. I have glasses yes.

2 **PRESIDING COMMISSIONER DAVIS:** Okay but you were
3 able to read it without them. But you do have glasses as
4 an accommodation in the event that you need them?

5 **INMATE DUBYAK:** Yes.

6 **PRESIDING COMMISSIONER DAVIS:** And you had those
7 when you read your C-File in preparation of this hearing?

8 **INMATE DUBYAK:** Yes.

9 **PRESIDING COMMISSIONER DAVIS:** And you can hear
10 me all right?

11 **INMATE DUBYAK:** Yes.

12 **PRESIDING COMMISSIONER DAVIS:** And you made it up
13 here under your own steam, you walked here all right?

14 **INMATE DUBYAK:** Yes.

15 **PRESIDING COMMISSIONER DAVIS:** Feel healthy and
16 fit and ready to go?

17 **INMATE DUBYAK:** Ready.

18 **PRESIDING COMMISSIONER DAVIS:** Any reason that
19 you can think of that you would not be able to actively
20 participate in this hearing today?

21 **INMATE DUBYAK:** No.

22 **PRESIDING COMMISSIONER DAVIS:** I do see that you
23 have some medical conditions including not lifting
24 certain things, no climbing, no bending, stooping and so
25 forth, some other medical conditions that did not
26 interfere with you getting to the hearing?

27 **INMATE DUBYAK:** No, I'm careful when I climb

1 steps I try to make steps (inaudible).

2 **PRESIDING COMMISSIONER DAVIS:** So you have a cane
3 as a partial accommodation as well. And you're able to
4 make it up the steps all right.

5 **INMATE DUBYAK:** Yes.

6 **PRESIDING COMMISSIONER DAVIS:** All right.
7 Counsel and you're satisfied with that as well?

8 **ATTORNEY FERGUSON:** Yes, sir.

9 **PRESIDING COMMISSIONER DAVIS:** This hearing is
10 being conducted pursuant to Penal Code Section 3041 and
11 3042 of the Rules and Regulations of the Governing Board
12 of Parole for life inmates. The purpose of today's
13 hearing is to once again consider the number and nature
14 of the crimes that you were committed, your prior
15 criminal and social history, and your behavior and
16 programming since your commitment. We've had the
17 opportunity to review your Central File and your prior
18 transcripts. And you'll be given the opportunity to
19 correct or clarify the record as we proceed. Now we will
20 reach a decision today and inform you whether or not we
21 find you suitable for parole and the reasons for our
22 decisions. If you are found suitable for parole the
23 length of your confinement will be explained to you.
24 Nothing that will happen here today will change the
25 findings of the court. The Panel is not here to retry
26 your case, we are here for the sole purpose of
27 determining your suitability for parole, do you

1 understand that sir?

2 **INMATE DUBYAK:** Yes.

3 **PRESIDING COMMISSIONER DAVIS:** This hearing will
4 be conducted in two phases. First I will discuss with
5 you the crime that you were committed for, your prior
6 criminal and social history. Commissioner Blonien will
7 discuss with you your progress since your commitment,
8 your counselor's report, and your psychological
9 evaluation, your parole plans, and any letters of support
10 or opposition as they may exist. Once that's concluded
11 the Commissioners, the District Attorney, your attorney
12 will have the opportunity to ask you questions. The
13 questions that come from the District Attorney will asked
14 through the Chair and you will respond back to the Panel
15 with your answer. Following that the District Attorney,
16 then your attorney will have an opportunity for a final
17 closing statement. Which will be followed by your
18 closing statement, which should focus on your suitability
19 for parole. The California Code of Regulations states
20 that regardless of time served an inmate shall be found
21 unsuitable and denied if in the judgement of the Panel
22 the inmate would pose an unreasonable risk of danger to
23 society if released from prison. And you have certain
24 rights those rights include a timely notice to the
25 hearing, the right to review your Central File and the
26 right to present relevant documents. Counsel are you
27 satisfied that your client's rights have been met today?

1 **ATTORNEY FERGUSON:** Yes, we are.

2 **PRESIDING COMMISSIONER DAVIS:** You have an
3 additional right to be heard by an impartial panel, you
4 heard Commissioner Blonien and I introduce ourselves
5 today, do you have any reason to believe that we would
6 not be impartial?

7 **INMATE DUBYAK:** I have no knowledge of either of
8 (inaudible).

9 **PRESIDING COMMISSIONER DAVIS:** You believe that
10 we would be impartial?

11 **INMATE DUBYAK:** That you don't have anything
12 against me.

13 **PRESIDING COMMISSIONER DAVIS:** All right, very
14 well. You will receive a written copy of our tentative
15 decision today, that decision becomes effective within
16 120 days and a copy of the decision and a copy of the
17 transcript will be sent to you. The Board has eliminated
18 it's appeal process, if you do disagree with anything in
19 today's hearing you have the right to go directly to
20 court with your appeal. Now you're not required to
21 discuss your offense or admit your offense, however the
22 Panel does accept the findings of the court as true. Do
23 you understand that?

24 **INMATE DUBYAK:** Yes, sir.

25 **PRESIDING COMMISSIONER DAVIS:** All right,
26 Commissioner Blonien, are we going to be using anything
27 from a confidential file.

1 **DEPUTY COMMISSIONER BLONIEN:** There is nothing in
2 a confidential file.

3 **PRESIDING COMMISSIONER DAVIS:** All right. I
4 previously passed to both counsel a checklist counsel and
5 district attorney the checklist of documents. Will you
6 both take a look at that please, make sure that you both
7 have those?

8 **ATTORNEY FERGUSON:** We've received the indicated
9 documents.

10 **DEPUTY DISTRICT ATTORNEY DAWSON:** I have them all
11 here.

12 **PRESIDING COMMISSIONER DAVIS:** Counsel, any
13 additional documents?

14 **ATTORNEY FERGUSON:** Yes, Mr. Dubyak has very
15 consciously put together a whole packet, which includes
16 various documents as far as his plans go. ✓

17 **PRESIDING COMMISSIONER DAVIS:** Good, thank you,
18 we'll take a look at those at the appropriate time. Any
19 preliminary objections?

20 **ATTORNEY FERGUSON:** None at this time.

21 **PRESIDING COMMISSIONER DAVIS:** All right, and
22 will your client be speaking to us today?

23 **ATTORNEY FERGUSON:** Yes, and he will be
24 stipulating to the official version of the facts.

25 **PRESIDING COMMISSIONER DAVIS:** All right, then.
26 Is that you don't want to talk about the incident offense
27 itself then, your just going to stipulate that? That way

1 we'll just avoid any questions regarding the incident
2 offense. All right, if you'll raise your right hand then
3 for all other matters. Do you solemnly swear or affirm
4 that the testimony that you at to give at this hearing
5 will be the truth and nothing but the truth?

6 **INMATE DUBYAK:** I do.

7 **PRESIDING COMMISSIONER DAVIS:** All right, without
8 objection I'd like to incorporate reference the Court of
9 Appeals document pages two through three. And refer to
10 the Board report dated July 2003 for the summary of the
11 crime, which states that,

12 "On August 27, 1985, Mr. Raul Rodriguez
13 R-O-D-R-I-G-U-E-Z of Marovis,
14 M-A-R-O-V-I-S, Puerto Rico, contact the
15 police department regarding the
16 disappearance of his sister, Lourdes
17 L-O-U-R-D-E-S, Dubyak. The investigation
18 was turned over to Detective Beckman, B-
19 E-C-K-M-A-N, Mr. Rodriguez advised
20 Detective Beckman that no one had seen or
21 heard from Lourdes after the accident in
22 1985. Mr. Rodriguez further indicated
23 that the victim kept in close contact
24 with her family. In addition, Mr.
25 Rodriguez indicated that had his sister
26 left the area, she would have taken her
27 two year old daughter Angelica, A-N-G-E-

1 L-I-C-A, Mr. Rodriguez had also advised
2 Detective Beckman that he had been in
3 contact with Lourdes' husband Samuel
4 Dubyak, the defendant and had received
5 inconsistent statements from him. He
6 also advised Detective Beckman that he
7 had called his sister at 9:00 p.m.
8 Pacific Daylight time and was advised by
9 Dubyak that she was not home. According
10 to the information received from a
11 neighbor the victim left her house
12 between 8:15 and 8:30 p.m. and would have
13 easily returned home prior the 9:00 p.m.
14 telephone call. Mr. Rodriguez indicated
15 that his sister and her husband have been
16 having marital problems for a period of
17 time and the victim had consulted with
18 him regarding divorcing her husband. Mr.
19 Rodriguez had further indicated that the
20 victim had been having affairs with
21 several individuals over the last several
22 months, a fact that which the inmate was
23 aware. Upon receiving this information,
24 Detective Beckman started his own
25 investigation about the whereabouts of
26 Lourdes Dubyak. Detective Beckman was
27 able to establish that on the weekend of

11

1 August 9th through August 11th, 1989, the
2 victim spent time with her lover, Marcel
3 Berasalece, B-E-R-A-S-A-L-E-C-E, in a
4 motel. Mr. Berasalece dropped the victim
5 off at her residence on August 11, 1985
6 in the early afternoon. The victim
7 telephoned him later that afternoon and
8 what was the last he heard of her. They
9 made arrangements to have a lunch date on
10 Tuesday, August 13, 1985, however the
11 victim failed to keep her engagement.
12 Detective Beckman interviewed Debbie
13 Alongis, A-L-O-N-G-I-S, a close friend
14 and neighbor of the victim. She
15 indicated that she had last seen the
16 victim on August 11, 1985 at
17 approximately 8:00 p.m. the victim left
18 her residence and was on her way home.
19 That was the last Ms. Alongis ever saw
20 the victim. However the following
21 morning Dubyak arrived at Ms. Alongis'
22 home and requested a videotape which had
23 been loaned to her family. Mr. Dubyak
24 advised Ms. Alongis that the victim had
25 left him. On August 30, 1985 the inmate
26 was interviewed by Detective Beckman
27 after being advised his rights, Dubyak

1 advised that his wife, Lourdes, had left
2 him on Sunday, August 11, 1985, between
3 9:00 and 9:30 p.m. he indicated that she
4 made a telephone call dropped off the
5 baby off in his room and said she had to
6 go out for awhile. Mr. Dubyak assumed
7 that the victim had taken her car.
8 However upon waking in the morning he
9 discovered that his wife had not left in
10 the automobile. As the investigation
11 continued Detective Beckman learned that
12 Dubyaks slept in separate bedrooms and
13 the bedroom that Mrs. Dubyak slept in had
14 been converted into a television room.
15 The double bed that Mrs. Dubyak slept in
16 was currently gone. When Detective
17 Beckman question Mr. Dubyak regarding
18 this, he indicated that the victim must
19 have taken this as he had no idea where
20 the bed was. The investigation of
21 Lourdes Dubyak continued, Detective
22 Beckman learned that on August 16, 1985
23 the inmate and his brother, Peter Dubyak,
24 along with a 13 year old juvenile from
25 the neighborhood had loaded a bed from
26 Dubyak's house into a truck. And
27 subsequently and had dumped it on the

1 side of the road, east of Ontario
2 International Airport. On November 5,
3 1985, that bed was discovered
4 approximately 200 yards east of Vineyard
5 Street in Ontario. The bed was
6 subsequently identified by family members
7 and neighbors as the bed, which was
8 originally in the victim's bedroom. On
9 November 6, 1985 the mattress, box
10 springs, and headboard were preliminary
11 examined by a San Francisco crime
12 laboratory. Tests for traces of human
13 blood were conducted negative results,
14 however during the examination two holes
15 were found to have been cut in the foam
16 part of the mattress. The complete
17 examination of the bed was completed on
18 November 8, 1985, at which time a
19 projectile exit hole was located on the
20 underside of the mattress. The
21 projectile exit hole was found in the box
22 spring of the mattress. The projectiles
23 were later determined to be made from a
24 .22 caliber long rifle with gold-jacketed
25 bullet. After presenting the above
26 information, Detective Beckman obtained
27 an arrest warrant for the inmate and his

1 brother Peter Dubyak for investigation of
2 murder. On December 2, 1985 a search
3 warrant was executed at 12248 Kumquat,
4 K-U-M-Q-U-A-T, Street. On that date a
5 luminol, L-U-M-I-N-O-L, reagent test was
6 conducted by San Bernardino County
7 Criminalistics Laboratory. The test was
8 made in an attempt to locate traces of
9 blood in the residence. When the luminol
10 reagent was applied in the bedroom in
11 which the bed had been, traces of
12 bloodstains were located in the wall near
13 the headboard of the bed around the light
14 switch and on the carpet itself. In
15 addition, bloodstains were also located
16 on the carpet of the hallway leading up
17 to the laundry room and the garage.
18 Additionally, the presence of blood was
19 located in the rear hatchback of the
20 vehicle belonging to Dubyak. In
21 addition, several hundred rounds of
22 Remington .22 caliber ammunition were
23 recovered from the residence. Although
24 the inmate was arrested on December 2,
25 1985, charges were not filed and he was
26 subsequently released on December 4,
27 1985. At that point the investigation

1 continued, at that point the additional
2 information was obtained continued to
3 indicate that Samuel Dubyak was
4 responsible for the disappearance and
5 probable death of Lordes Dubyak. Checks
6 of the victim's charged card revealed
7 that no charges had been made during that
8 time and there had been no activity on
9 the part of the victim on a joint
10 checking account. During the time it had
11 been established that Dubyak had reported
12 to work on Monday August 12, 1985.
13 However after being there approximately
14 45 minutes, he had left ill. Dubyak
15 subsequently returned to work the
16 following day, during that time the
17 investigation continued as to the
18 whereabouts of the victim and other
19 evidence was obtained from additional
20 witnesses. On March 3, 1986 Dubyak
21 contacted Vivian Almovodar,
22 A-L-M-O-V-O-D-A-R, the victim's aunt.
23 The inmate showed the Mrs. Almovodar a
24 letter which he said had been received on
25 March 1, 1986, Mrs. Almovodar indicated
26 that the letter was typed, however the
27 letter was signed by the victim, Lourdes.

1 The letter was subsequently obtained by
2 Chino Police Department on April 1986,
3 however tests from the Federal Bureau of
4 Investigations indicated that the
5 signature of "Lourdes" had been traced
6 from another signature. On September 3,
7 1986, after almost 13 months of
8 investigation the inmate was again
9 arrested for the murder of Lourdes
10 Dubyak. On November 12, 1986 criminal
11 information was filed in the West
12 District Superior Court by Deputy
13 District Attorney Robert Guizzino,
14 G-U-I-Z-Z-I-N-O, accusing the defendant
15 of murder in violation of Penal Code
16 Section 187, an additional allegations
17 that the defendant used a firearm pursuant
18 to Penal Code Section 12022.5. On
19 February 26, 1987 after deliberating less
20 than six hours the jury found the
21 defendant guilty of murder in the first
22 degree with enhancement of use of a
23 firearm."

24 And this was all from the probation officer's report.
25 And as always counsel if your client would like to he
26 certainly welcome to address the Board however we
27 understand that he has an absolute right not to and that ✓

17

1 will not be held against him. Under prisoner's version
2 in the same report it does state that on March 9, 1987
3 the inmate was interviewed that the San Bernardino County
4 Jail. Mr. Dubyak assisted in completing the face sheet
5 of the probation report, however indicated that on the
6 advice of an attorney he did not wish to discuss the
7 matter with the undersigned officer related that he
8 anticipates his conviction to be appealed. He did state
9 however to the undersigned officer "I am innocent." Mr.
10 Dubyak was aware that he would be sentenced to state
11 prison on the matter however requested the clerk postpone
12 his delivery to the Department of Corrections until after
13 April of 1987. And it goes on to that's really to some
14 exception of the statement. In terms of prior arrests,
15 we note that in terms of the juvenile record you have a
16 record 6/4/1987 from Los Angeles Police Department had ✓
17 one arrest for suspicion of burglary. There was no
18 disposition available. And that the commitment offense ✕
19 was the only adult offense for Mr. Dubyak. Is that
20 correct sir?

21 **INMATE DUBYAK:** There was no disposition; there
22 was a trial on 19th of December.

23 **PRESIDING COMMISSIONER DAVIS:** And what happened
24 as a result of that?

25 **INMATE DUBYAK:** Does that say '87?

26 **PRESIDING COMMISSIONER DAVIS:** Oh that's the
27 record from 1987, on 3/11/1957 was the burglary arrest.

1 Was there a trial for that?

2 **INMATE DUBYAK:** No.

3 **PRESIDING COMMISSIONER DAVIS:** Okay.

4 **INMATE DUBYAK:** (Inaudible).

5 **PRESIDING COMMISSIONER DAVIS:** Oh, it was in
6 1957. But no adult arrests other than the commitment
7 offense, is that correct sir? ✓

8 **INMATE DUBYAK:** Correct. (Inaudible)

9 **PRESIDING COMMISSIONER DAVIS:** Okay.

10 **INMATE DUBYAK:** There was an arrest in either 68
11 or 69 when I worked at a grocery store. There was a child
12 and I (inaudible).

13 **PRESIDING COMMISSIONER DAVIS:** What was the crime
14 that you were accused of?

15 **INMATE DUBYAK:** I seen him liquored up at the
16 store and I had sold him my car and I needed registration
17 and I didn't change the registration and (inaudible). The
18 car was impounded the next day.

19 **PRESIDING COMMISSIONER DAVIS:** You had nothing to
20 do with it whatsoever. Okay.

21 **INMATE DUBYAK:** But I got arrested for it.

22 **PRESIDING COMMISSIONER DAVIS:** So you were born
23 in Pennsylvania.

24 **INMATE DUBYAK:** Yes, sir.

25 **PRESIDING COMMISSIONER DAVIS:** The middle child
26 of three siblings, the family moved to California, you
27 settle in Los Angeles. Attended Washington High School

1 from 1958 to 1960. And attended the Northrop Institute
2 from 63-64, what's the Northrop Institute?

3 **INMATE DUBYAK:** That's aircraft technology,
4 aircraft engineering.

5 **PRESIDING COMMISSIONER DAVIS:** And what did you
6 learn to do there?

7 **INMATE DUBYAK:** I did some engineering and I did
8 some aircraft (inaudible).

9 **PRESIDING COMMISSIONER DAVIS:** In '66-'67 you
10 attended Rose School of Aviation in Hawthorne as a
11 commercial pilot, so you were a commercial pilot at one
12 time?

13 **INMATE DUBYAK:** Yes, sir.

14 **PRESIDING COMMISSIONER DAVIS:** And for whom did
15 you fly?

16 **INMATE DUBYAK:** Just Rose Aviation and
17 (inaudible).

18 **PRESIDING COMMISSIONER DAVIS:** So you were flying
19 what, private?

20 **INMATE DUBYAK:** Yes, private and air tours.

21 **PRESIDING COMMISSIONER DAVIS:** In terms of
22 employment history you worked for Ethic Manufacturing in
23 Los Angeles as a foreman from 72-77. And is it Andal
24 Corporation,

25 **INMATE DUBYAK:** A-M-D-A-L

26 **PRESIDING COMMISSIONER DAVIS:** Oh, it's A-M,
27 Amdal Corporation in Marina Del Rey. As a production

20

1 planner from 77-82 and Hughes Helicopters in Culver City
2 as a production analyst from 82-86. You were in the
3 United States Marine Corp from 1960-63, and honorable
4 discharge. What was your rank at discharge?

5 **INMATE DUBYAK:** Lance Corporal ~~E-4~~ ^{E-3} *SD*

6 **PRESIDING COMMISSIONER DAVIS:** You previously
7 married a Virginia Chicon?

8 **INMATE DUBYAK:** Chicon.

9 **PRESIDING COMMISSIONER DAVIS:** In 1973, oh the
10 marriage ended in divorce in 73 or 75?

11 **INMATE DUBYAK:** I think it was 73 or 72.

12 **PRESIDING COMMISSIONER DAVIS:** It says you have a
13 five children, is that from the first marriage?

14 **INMATE DUBYAK:** Four in the first marriage and
15 the fifth one in the second marriage.

16 **PRESIDING COMMISSIONER DAVIS:** Do you keep in
17 contact with your children?

18 **INMATE DUBYAK:** Yes, I do.

19 **PRESIDING COMMISSIONER DAVIS:** All of them?

20 **INMATE DUBYAK:** Yes, I do.

21 **PRESIDING COMMISSIONER DAVIS:** Including the one
22 from the second marriage?

23 **INMATE DUBYAK:** Yes.

24 **PRESIDING COMMISSIONER DAVIS:** And how do you,
25 cards and letters so forth.

26 **INMATE DUBYAK:** We started writing and I found
27 (inaudible) I started writing and she responded back and

1 I was able to make a few telephone calls and (inaudible).

2 **PRESIDING COMMISSIONER DAVIS:** And now when you
3 say she, it's the daughter of Lourdes?

4 **INMATE DUBYAK:** Lourdes.

5 **PRESIDING COMMISSIONER DAVIS:** Lourdes and your
6 daughter. During the interview of 4/3/03 (inaudible)
7 married in Costa Rica and were divorced in Torrence
8 California, not in Las Vegas, Nevada, as stated in the
9 P.O.R, Dubyak and Lourdes, the victim were married on the
10 Queen Mary in the Long Beach Harbor in 1981.

11 **INMATE DUBYAK:** Correct.

12 **PRESIDING COMMISSIONER DAVIS:** Let me know if
13 there is an error at some point in time. Anything else
14 about your life prior to the incident offense itself or
15 your prior arrest record or anything else you want to
16 clarify or add any detail to?

17 **INMATE DUBYAK:** No.

18 **PRESIDING COMMISSIONER DAVIS:** All right, if you
19 think of something as we move along, please don't
20 hesitate say wait a minute I remember one of those
21 things. Questions?

22 **ATTORNEY FERGUSON:** None.

23 **PRESIDING COMMISSIONER DAVIS:** All right, then
24 I'll ask you to move your attention over to Commissioner
25 Blonien.

26 **DEPUTY COMMISSIONER BLONIEN:** Mr. Dubyak, this is
27 your first subsequent hearing and your last appearance

1 before the Board was September 2, 2003. And the Panel
2 decision was a three year denial, the Panel recommended
3 that you become and remain disciplinary free and you
4 participate in self help. Specific recommendation was to
5 participate in anger management. Your custody level is
6 medium A, your classification score is 19, which is the
7 lowest possible for a lifer inmate. So in order to do
8 this report, I read the Board Report, prepared by your
9 counselor, Berdsoto, B-E-R-D-S-O-T-O, dated June 30 of
10 2006. I read the new psych report by Dr. Merek, ✓
11 M-E-R-E-K, dated Septemeber of '06. I've gone through
12 your C-File and I see that you did an Olsen review of
13 your C-File on May 10 of '06. Correct?

14 **INMATE DUBYAK:** Correct.

15 **DEPUTY COMMISSIONER BLONIEN:** And I've gone
16 through the whole Board packet. So since you've been in
17 the institution you've only had one 115 in 1994 and that ✓
18 was for manipulating the mail process. You had one 128 ✓
19 in 1999 for a physical, a very minor physical
20 altercation. At your last hearing they asked you about
21 your high school diploma, that wasn't in your C-file, it
22 is now in your C-File. You graduated in June 1, 1960,
23 correct?

24 **INMATE DUBYAK:** Correct.

25 **DEPUTY COMMISSIONER BLONIEN:** And you've taken ✓
26 several college courses in Political Science, Accounting,
27 Real Estate, Spanish, you completed Spanish course in

1 2000 and 2001. You completed the Real Estate course in ✓
2 November of 2005 and you're currently taking the
3 Accounting course, right?

4 **INMATE DUBYAK:** I just finished the Accounting
5 course (inaudible) two, three, four months ago.

6 **DEPUTY COMMISSIONER BLONIEN:** What grade did you
7 get?

8 **INMATE DUBYAK:** I'm waiting for my results.

9 **DEPUTY COMMISSIONER BLONIEN:** Well you do well in
10 the courses that you take, I saw that. And you also have
11 a Bachelor of Science from Embry-Riddle Aeronautic
12 University in Aviation Technology. And you got that in
13 2001. I was compiling a lot of my grades in my downtime
14 and my previous aeronautic experience.

15 **DEPUTY COMMISSIONER BLONIEN:** So that must have
16 taken you quite a bit of time to put that together.

17 **INMATE DUBYAK:** Well I've been flying for 49
18 years, I've got quite a few hours on my commercial
19 (inaudible).

20 **DEPUTY COMMISSIONER BLONIEN:** So where is Embry-
21 Riddle Aeronautic University?

22 **INMATE DUBYAK:** They have one in San Francisco, I
23 think in Florida.

24 **DEPUTY COMMISSIONER BLONIEN:** So you put together
25 a packet of the courses that you've taken and your flying
26 time and you submitted that to them.

27 **INMATE DUBYAK:** And some other different

1 (inaudible), just a minute.

2 **DEPUTY COMMISSIONER BLONIEN:** Okay, do you need
3 water?

4 **INMATE DUBYAK:** I just took some pills before
5 (inaudible).

6 **DEPUTY COMMISSIONER BLONIEN:** You need a minute.

7 **INMATE DUBYAK:** No, a little dry mouth as I
8 expected to get. I got some help from a person on the
9 outside that got some of my past history together
10 (inaudible). My flight time.

11 **DEPUTY COMMISSIONER BLONIEN:** Do you want to take
12 a break just for five minutes?

13 **ATTORNEY FERGUSON:** Just some water.

14 **INMATE DUBYAK:** I don't want to pass out.

15 **DEPUTY COMMISSIONER BLONIEN:** We don't want you
16 to do that. Well we got you in a very stable chair.
17 Well let's just go off for a minute, let him drink his
18 water?

19 **PRESIDING COMMISSIONER DAVIS:** Sure.

20 (OFF RECORD)

21 **DEPUTY COMMISSIONER BLONIEN:** Okay, you were
22 telling me about how you put together this packet.

23 **INMATE DUBYAK:** I put together my flight time and
24 total aviation administration, my commercial pilot's
25 license. And through my flight hours and my education
26 and my other credits, I was entitled to a degree from the
27 school.

1 **DEPUTY COMMISSIONER BLONIEN:** And in talking with
2 your counselor, your psychologist, you study different
3 legal issues also related to your case? ✓

4 **INMATE DUBYAK:** Yes, I studied different
5 languages, French and Spanish.

6 **DEPUTY COMMISSIONER BLONIEN:** I saw all the
7 Spanish, I didn't see the French. How much French did
8 you have?

9 **INMATE DUBYAK:** I have to take a course and quite
10 frankly the rules (inaudible) I can't recognize words and
11 memorize (inaudible).

12 **DEPUTY COMMISSIONER BLONIEN:** It's different than
13 Spanish and English. You worked as a ^{WING}~~wayne~~ porter. *10*

14 **INMATE DUBYAK:** Yes.

15 **DEPUTY COMMISSIONER BLONIEN:** Although your
16 supervisor evaluations, I couldn't find one after 03 and
17 they were totally satisfactory. But I didn't see a
18 current one.

19 **INMATE DUBYAK:** (Inaudible).

20 **DEPUTY COMMISSIONER BLONIEN:** I'm not sure
21 either, I do see that. You were assigned there. In
22 terms of -- well the big question. The last Panel was
23 pretty specific in recommending that you participate in
24 self-help therapy and specificity in anger management and *
25 anger control. And I don't see anything in that arena,
26 are you reading a book in that area?

27 **INMATE DUBYAK:** No, but I invest about two or

1 three hours a day in anger management. Walking out on
2 the wing, going to the yard and people have no idea what
3 you have to deal with in here and in the get into the
4 shower and have to wait for other people who are shooting
5 up drugs. And sitting down by your table and they're
6 getting and yelling in your ears, while you're trying to
7 hold a conversation. I'm getting to go through more
8 anger management in the general population than any class
9 is going to get me. (Inaudible).

10 **DEPUTY COMMISSIONER BLONIE:** There are different
11 ways to approach anger control and anger management. In
12 what you're just talking about is a possible way. But
13 you and I having a conversation about it is not the same
14 as presenting documentation that you've given it some
15 thought. That you've been introspective about your past
16 life and decisions that you made there. And how critical
17 thinking is bringing you a way from an angry response
18 now. And if you'll just document it, what you're doing
19 in that arena, the Board accepts self-help in terms of
20 self-study. In terms of we talked about education, we
21 talked about work, we talked about (inaudible) since '94.
22 When I look at your psych report by Dr. Merek, he talks a
23 lot about your education history and gives you no
24 diagnosis under anything wrong under Axis I or Axis II.
25 He notes that your many physical issues and gives you a
26 Global Assessment Functioning Score of 80. So there was
27 never any alcohol or drug abuse in your history.

1 **INMATE DUBYAK:** I never used drugs in my life. I ✓
2 maybe drink once a month (inaudible). That's been my
3 (inaudible) since I've been 24-25 years old.

4 **DEPUTY COMMISSIONER BLONIEN:** It's sort of
5 unusual with a military history.

6 **INMATE DUBYAK:** Yes.

7 **DEPUTY COMMISSIONER BLONIEN:** You sort of see a
8 lot of people with military history, and for some reason
9 drinking issues. How did you stay out of that?

10 **INMATE DUBYAK:** I entered the Marine Corps when I
11 was 17 years old. (Inaudible) and when I came out of
12 high school I was, I don't want to use the word naïve, I
13 was a country boy and I just never drank, never really
14 cared for it. I took a drink one time in the Marine
15 Corps when they have what they call a Beer ^{Bust}~~Buzz~~ parties ~~AD~~
16 out in the desert someplace, I always drunk a can of Coke
17 or something, just never got into it.

18 **DEPUTY COMMISSIONER BLONIEN:** I know once a Marine
19 always a Marine, when did you get out of the Marine Corps.

20 **INMATE DUBYAK:** I guess I'm not out. I got out in
21 '63.

22 **DEPUTY COMMISSIONER BLONIEN:** And how come you
23 didn't pursue your flying?

24 **INMATE DUBYAK:** When I went in at 17, at the time
25 I had a 144 IQ so they waived the college requirement on
26 me. I was supposed to go right into the (inaudible)
27 program, but because I was 17 they said I couldn't get

1 into the program until I was 18. And that was six to nine
2 months down the road. When I became 18 I needed to
3 reenlist and I was short of time the way they did the
4 program and I just didn't care the way they did the
5 (inaudible).

6 **DEPUTY COMMISSIONER BLONIEN:** So you pursued that
7 interest on the private sector. In talking about your
8 assessment of dangerousness, the doctor said in a *
9 controlled setting your violence potential is lower than
10 that of an average inmate, you only received the one 115
11 and one custodial chrono. But if released to the
12 community your violence potential is lower than that of *
13 the average citizen. You spent most of your life being
14 responsible and the incident offense is the only adult
15 conviction. He is indeed guilty of the current offense,
16 it doesn't seem likely that he would commit murder again.
17 Since he does not have a life pattern of violence, the
18 only apparent risk factor a precursor to violence would be
19 to some how revisit the same sort of marriage scenario
20 that you had with your second wife and not seeing where
21 this could lead. It would seem based on his history of *
22 responsible behavior, good institutional behavior, efforts
23 as self improvement, intelligence and an external desire
24 to not return to prison, that he would be able to
25 extricate himself from this predicament before it got
26 worse. He's confident and responsible for his behavior
27 and has the capacity to abide by institutional standards

1 and has primarily done so during his incarceration. He
2 does not have a mental health disorder and that would
3 necessitate treatment while incarcerated or on parole. *
4 There's no obvious mandatory conditions or
5 recommendations. Parole decisions should be based on
6 custody factors. So with that I am going to return to the
7 chair.

8 **PRESIDING COMMISSIONER DAVIS:** Can you explain the
9 115 in 1994?

10 **DEPUTY COMMISSIONER BLONIEN:** The mail?

11 **PRESIDING COMMISSIONER DAVIS:** Yep.

12 **INMATE DUBYAK:** I used to do legal work for
13 inmates. And this one inmate used to hassle with his
14 staff and his mail getting out. And I didn't a service ~~19~~
15 for him, it was my address on the outside of the envelope.
16 (Inaudible). But I was nonetheless given the 115.

17 **DEPUTY COMMISSIONER BLONIEN:** The other thing that
18 I didn't say that I should have said that you also sit ✓
19 with other inmates and help them with their reading. And I
20 think that's pretty important. Oh and I didn't talk to
21 you about your parole plans and you made this wonderful ✓
22 packet here. That you plan to reside with your sister, ✓
23 you have a type written letter from your sister dated
24 6/22/06, her name is Delores Warwick, W-A-R-W-I-C-K, and
25 that you are welcome to live with her, that you have her
26 support and the support of your daughters that will help
27 you reintegrate back into society in a positive way. That

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1 she knows you'll be applying for social security. She ✓
2 also knows about your physical issues, she also knows
3 about your education and that you've received while you're
4 in the institution. I don't recommend you become a day
5 trader, I think that would be pretty amazing.

6 **INMATE DUBYAK:** I'm talking about day trading on
7 the computer, I used to play stocks a few years ago.

8 **DEPUTY COMMISSIONER BLONIEN:** It's going well
9 right now. You also have your estimated social security
10 benefits, which would be \$875 a month at 62, and if you ✓
11 wait until your full retirement which is 65 and four
12 months you'll get 1148, you also probably eligible for
13 disability, SSI. And you have the application that you
14 filled out for that. You have a letter from the Federal
15 Aviator Administration on 10/11, the date's a little
16 blurred here talking about your commercial license
17 certification, wanted a copy of that, and correspondence
18 dealing with that issue. A letter from your counsel to
19 the Federal Aviation Administration talking about your
20 lack of participation in drugs or alcohol while
21 incarcerated. Talking about your entrepreneurship class.
22 So you live with your sister, you get social security, and
23 then you continue your education and use your education to
24 succeed in the area of stocks and you visit your children
25 when you have permission of your parole agent. And your
26 sister lives in ^{Alhambra}~~Pomona~~ California. Where's that? *LA.*

27 **INMATE DUBYAK:** It's about 80 miles down the road

1 a little.

2 **DEPUTY COMMISSIONER BLONIEN:** Does she come visit
3 you?

4 **INMATE DUBYAK:** No. Basically I've been permitted
5 to visit since I've been here (inaudible).

6 **DEPUTY COMMISSIONER BLONIEN:** We also sent out
7 3042 notices to law enforcement, victim next of kin, and ✓
8 although I don't get any written letters in response, the
9 District Attorney from San Bernardino is here and at the
10 appropriate time she'll be allowed to make her comments on
11 the record. So anything else I missed that we haven't
12 talked about in terms of what you've been doing in the
13 institution?

14 **INMATE DUBYAK:** Apparently I'm waiting for,
15 there's only about 12 to 14 courses that I can get at.
16 I'm waiting for business math, a business law course
17 (inaudible).

18 **DEPUTY COMMISSIONER BLONIEN:** How do you pay for
19 these courses?

20 **INMATE DUBYAK:** These ones are free.

21 **DEPUTY COMMISSIONER BLONIEN:** Does anyone on the
22 outside send you any money?

23 **INMATE DUBYAK:** Occasionally my daughter and my
24 sister send me something, my sister sends me a quarter
25 package, a package every quarter. My daughter in
26 Washington DC (inaudible). And the Spanish course I had a
27 former girlfriend holding \$2 that I had because she bought

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1 a Spanish course years ago and it cost something like
2 \$386, (inaudible).

3 **DEPUTY COMMISSIONER BLONIEN:** And have you ever ✓
4 thought about going to a self-help course. Are you on any
5 waiting list or anything?

6 **INMATE DUBYAK:** Honestly, I'm not (inaudible) I ✓
7 have problems sitting and problems standing. I have real
8 bad problems with drug addicts and alcoholics (inaudible).

9 **DEPUTY COMMISSIONER BLONIEN:** There's a lot of
10 drug addicts out in society now.

11 **INMATE DUBYAK:** Yeah.

12 **DEPUTY COMMISSIONER BLONIEN:** And the world's gone
13 (inaudible).

14 **INMATE DUBYAK:** It's just, it's just not my thing.

15 **DEPUTY COMMISSIONER BLONIEN:** I'll turn back to
16 the chair.

17 **PRESIDING COMMISSIONER DAVIS:** All right thank
18 you. Any of the -- with your disability you do quite a
19 bit of sitting, so how are you able to complete that given
20 the limitations that you have.

21 **INMATE DUBYAK:** I take about five semester credits
22 a month and between (inaudible).

23 **PRESIDING COMMISSIONER DAVIS:** I mean in terms of
24 your sitting and reading.

25 **INMATE DUBYAK:** I either take a book out to the
26 yard with me or I do one chapter and then I got my answers
27 (inaudible).

1 **PRESIDING COMMISSIONER DAVIS:** And have you
2 thought about using any of the self-help books in the same ✓
3 way?

4 **INMATE DUBYAK:** Honestly no. Not that I haven't
5 thought about it, I just haven't looked at it.

6 **PRESIDING COMMISSIONER DAVIS:** Do you know that
7 the last Panel told you was important?

8 **INMATE DUBYAK:** I just didn't feel like I had an
9 anger management problem, I wasn't an alcoholic, I just ✓
10 couldn't see --

11 **PRESIDING COMMISSIONER DAVIS:** I'm talking about
12 self-help, not AA or anything like that. ✓

13 **INMATE DUBYAK:** Oh I thought self-help was more ✓
14 toward me furthering my education and guidelines.

15 **PRESIDING COMMISSIONER DAVIS:** That's self-help as
16 well but it doesn't get to the more specific issue of ✓
17 anger management and so forth. But you described what you
18 were doing. I don't have any questions, Commissioner do
19 you?

20 **DEPUTY COMMISSIONER BLONIE:** No, I don't.

21 **PRESIDING COMMISSIONER DAVIS:** Does the District
22 Attorney have questions?

23 **DEPUTY DISTRICT ATTORNEY DAWSON:** No, sir.

24 **PRESIDING COMMISSIONER DAVIS:** All right, Counsel

25 **ATTORNEY FERGUSON:** I have no questions.

26 **PRESIDING COMMISSIONER DAVIS:** All right, closing?

27 **DEPUTY DISTRICT ATTORNEY DAWSON:** Thank you,

1 although the Board has already touched on it, I believe
2 that the previous Board in no uncertain terms explained
3 that they wanted him to participate in self-help in
4 dealing with this situation. He claims that he is not an
5 angry person yet there was indication that his wife was
6 having an affair and that she was murdered. I find the
7 doctor's statement on his second to last page, that he is ^(IF) ~~is~~ *is*
8 indeed guilty of the current offense. I think that is an
9 obscene statement for the doctor to put in his report
10 considering this man was found guilty by a jury and
11 through the appeals process continues to be found guilty.
12 Obviously he has an anger problem, he has a low tolerance
13 for quite a few people. He obviously had an episode with
14 his wife. He not only killed her, her body's never been
15 found. He tried to destroy all of the evidence that would
16 link him to that murder. He is an intelligent man, who
17 used his intelligence for that. However the forensics
18 were a little bit better than he was. He is still a
19 danger. There has been no insight into anything. The
20 Distirct Attorney's Office of San Bernardino would ask the
21 Board at this time to deny parole date at this time.

22 **PRESIDING COMMISSIONER DAVIS:** All right, thank
23 you. Counselor?

24 **ATTORNEY FERGUSON:** Yes, thank you. Much has been
25 said here about anger management and self-help. This kind
26 of institution is a pretty volatile place and I think
27 we're all aware of that, there's conflictual situations

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1 that come up on a daily if not hourly basis for somebody
2 in Mr. Dubyak's position. He's been remarkably been able ✓
3 to deal with those situation and deflect any kind of
4 conflict that has come his way over these many years.
5 There must have been dozens, scores, untold numbers of ✓
6 occasions wherein Mr. Dubyak had to turn the other cheek,
7 extricate himself from somebody coming at him in a
8 physical manner. Given the fact that he has had zero
9 incidents of any kind of violence within the institution.
10 Really any disciplinary history of any nature whatsoever,
11 I think speaks volumes of the fact that he is not a
12 violent person. In fact he's quite adaptive in avoiding
13 violence. That's born out by the lack of any 115s, other
14 than the single one so many years ago. Wherein he was
15 accused of circumventing the mail procedures. Otherwise,
16 as the doctor pointed out he has been an excellent ✓
17 prisoner. And the Board back in 03 acknowledged that as ✓
18 well. But in any event, the self-help has benefit for
19 some people clearly, somebody that needs or has AA or NA,
20 people who are involved in conflictual. (tape turned
21 over)

22 **DEPUTY COMMISSIONER BLONIEN:** Side two.

23 **ATTORNEY FERGUSON:** And it's not that Mr. Dubyak
24 is the type of inmate that is just killing time. He keeps
25 himself busy, clearly. He studies languages, reads a lot,
26 has channeled his energy into constructive manners and
27 with regards to the things that he's accomplished. Other

1 than the life crime, Mr. Dubyak really has no other
2 history. It's the mission of this Board to determine if
3 Mr. Dubyak presents an unreasonable risk of danger to be
4 released into free society. And on that count it's not
5 only his lack of problems within the institutional
6 setting, but is also underscored by the doctor's
7 assessment of dangerousness. Wherein Dr. Merek indicates
8 that while in a controlled setting his violence potential
9 is lower than that of the average inmate, he too
10 acknowledges the fact that there's only been the one 115.
11 And further more if released to the community his violence
12 potential is lower than the average citizen. Lower than
13 the average citizen. Not the same as the average citizen,
14 but lower than the average citizen. And the doctor
15 acknowledges that he doesn't have the pattern of violence,
16 the only apparent significant risk factor and precursor to
17 violence would be if some how revisiting the same sort of
18 marital scenario he had with his second wife and not see
19 where this could lead. And it would be seem based on his
20 history of responsible behavior and institutional
21 adjustment efforts in self-improvement and intelligence in
22 external desire to not return to prison that he would be
23 able to extricate himself from this predicament before it
24 got worse. To me that's a complete endorsement of Mr.
25 Dubyak's readiness for parole. That coupled with the fact
26 that he does have family, his sister in ^{WIPOMO} ~~Pomona~~ who has a ~~10~~
27 place for him to go to. The residence situation is taken

1 care of. He has provided the Board with a well thought
2 out packet of information wherein he has established that ✓
3 he has the financial resources in terms of Social Security
4 and that can also be enhanced with disability payments
5 which he would seemingly be entitled to. So for all these
6 reasons, we would urge the Board to find Mr. Dubyak
7 suitable because we believe strongly that has a
8 (inaudible). And with that we'll submit.

9 **PRESIDING COMMISSIONER DAVIS:** All right, thank
10 you. Mr. Dubyak it is now your opportunity to address the
11 Panel directly regarding your suitability for parole.
12 You've been sitting here now for a little bit I know you
13 have some difficulty sitting and so forth for longer
14 periods of time, do you need a break before you start?

15 **INMATE DUBYAK:** No.

16 **PRESIDING COMMISSIONER DAVIS:** Okay.

17 **INMATE DUBYAK:** Well, I would like to say that my
18 understanding of, that my furthering my education it was ✓
19 more on the self-help basis. That I believe I don't have
20 an anger management problem. But the Board does see that
21 I have an anger management problem twenty years ago. The
22 incident that I was convicted of twenty years ago is
23 appropriate for today statement that I had an anger
24 management problem. I've done, I've kept myself clean.
25 I've never had any alcohol or drug problems in here that ✓
26 I've seen more drugs in here than I see on the outside.
27 I'm not a violent person, most people see a violent crime

1 that (inaudible) conviction. So that was 21 years in the
2 past, I am 64 years old. Deputy District Attorney stated
3 that the forensics were better than me, that is not the
4 case.

5 **PRESIDING COMMISSIONER DAVIS:** Mr. Dubyak, I would ✓
6 like you to confine yourself to your suitability for
7 parole. Not answering what the District Attorney said.

8 **INMATE DUBYAK:** I plan on furthering my education
9 on the outside (inaudible) paralegal of course. I've
10 educated myself since high school and never stopped. I've
11 never had any problems in high school or (inaudible).
12 There is no reason in my mind for denial. If I need more
13 (inaudible) or I need self-help I can still legally get a
14 date. (Inaudible). That's all I don't know what else to
15 say. (Inaudible). Thanks and I don't know what else to
16 say.

17 **PRESIDING COMMISSIONER DAVIS:** All right. Thank
18 you very much. We'll now recess for deliberations.

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R E C E S S

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1 CALIFORNIA BOARD OF PAROLE HEARINGS

2 DECISION

3 DEPUTY COMMISSIONER BLONIEN: We are on record.

4 PRESIDING COMMISSIONER DAVIS: All right, let the
5 record reflect that all those previously identified as
6 being in the room have returned. This is in the matter
7 of Samuel Dubyak, CDC number D-54700. The panel the panel
8 reviewed all the information received from the public and
9 relied on the following circumstances in concluding that
10 the prisoner suitable for parole and would not pose *
11 unreasonable risk of danger to society or threat to
12 public safety if released from prison. We come to this
13 conclusion, first and foremost, by the commitment
14 offense. The offense was carried out in a manner that
15 dispassionate and calculated. The motive was
16 inexplicable in relation to the offense. These
17 conclusions are drawn from the statement of facts where
18 the prisoner, based on his conviction, used a firearm to
19 kill the victim, then went to great length and
20 significant deception to hide his involvement. Given his
21 history he clearly had the opportunity and ability to
22 choose other non-violent options but did not do so. With
23 regard to criminal conduct, we find that criminal conduct
24 consists of a juvenile arrest in 1957. With regard to
25 institutional behavior we find that you programmed while
26 in a limited manner while incarcerated. You have

1 described your pursuit of education as self-help, however
2 you have a responsible job and education when you were
3 convicted of this murder. The Panel strongly encourages
4 you to look beyond your current education process and
5 look to forms of self-help. With regard to your other
6 institutional behavior we find that there is one 128
7 counseling chrono, the last of which was in 4/99 and one
8 serious 115 that's been recorded in 2/1994. According to
9 the psychological report in August 2006 by Dr. Merek, we
10 find that it is supportive. The basis of assessing Mr.
11 Dubyak as 'lower than the average citizen'. And looking
12 to into the future if released and he does not find
13 himself in a similar situation seems at best
14 questionable. And seemingly based on a questionable,
15 seeming to base the question on whether or not Mr. Dubyak
16 had committed the crime for which he has been convicted.
17 We also note that seems to be in conflict with the prior
18 assessment. This is the one in 2003 from Dr. Steward,
19 where in the assessment of dangerousness, item B if
20 release to the community is not possible to predict the
21 dangerousness since he did not discuss the event and the
22 details of the conviction. Since inmate Dubyak is not a
23 mass murderer it is unlikely he would recommit such an
24 offense, however if he were to become involved in a
25 trusting and intimate relationship in which he feels
26 betrayed then there's potential of him handling the

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1 situation in a similar manner. However one hopes that
2 with maturity he would not do so. There is concern for
3 his calculating and detached nature in which he conducted
4 himself during the investigation. And I would underline
5 however that this is simply the doctor report and the
6 Panel again does not hold the fact that he does not
7 discuss his conviction against him. With regard to
8 parole plans, we find that you do have appropriate
9 residential parole plans. With regard to employment, the
10 Panel notes that you are eligible for Social Security.
11 The plan to be a day trader is something that the Panel
12 cannot assess, except to say that does not seem to be a
13 strong option with the track record of success for most
14 people. With regard to the 3042 notices we note that the
15 District Attorney from San Bernardino County is here in
16 person by representative and does oppose parole. And
17 never the less we want to commend you for obtaining your
18 B.S. from Embry-Middle University, for your accounting
19 work the class that you just completed and are awaiting
20 the results, your real estate course, for being a ^{WING}wayne ~~AD~~
21 porter with satisfactory rating through 2003. However
22 there has been no rating since 2003 that we can find.
23 These positive aspects of behavior do not outweigh the ✓
24 factors for unsuitability. In a separate decision, the
25 Hearing Panel finds the prison has been convicted of
26 murder and it is not reasonable to expect him to that

1 parole to be granted within the next three years. We
2 come to this conclusion, first and foremost, by the
3 commitment offense. The offense was carried out in a
4 manner that dispassionate and calculated manner. The
5 motive was inexplicable in relation to the offense.
6 These conclusions are drawn from the statement of facts
7 wherein the prisoner, based on his conviction, used a
8 firearm to kill the victim, then went to great lengths
9 and significant deception to hide his involvement. Given
10 his history he clearly had the opportunity and ability to
11 choose other non-violent options but did not do so. We
12 find that there is criminal conduct that exists with a
13 juvenile arrest in 1957, however that you have programmed
14 in a limited manner while incarcerated. You have
15 described your pursuit of education as self-help, however
16 you have a responsible job and education when you
17 committed the murder. The Panel strongly encourages you
18 to look beyond your current education process and look to
19 other forms of self-help. There are two incidents of
20 disciplines while incarcerated one a 128 counseling
21 chrono in 4/99 and one serious 115 disciplinary report in
22 2/1994. The psychological report of August 2006 by Dr.
23 Merek is supportive. However is somewhat questionable on
24 part of the Panel for all of the reasons previously
25 quoted in the first decision. In regard to the parole
26 plans, we do note that you have appropriate plans for a

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1 residence. And do have an (inaudible) for Social
2 Security. However the plan to be a day trader is
3 something that the Panel cannot assess. Except to say
4 that it does not seem to be a strong option with the
5 track record of success for most people. With regard to
6 the 3042 notices we note that the District Attorney from
7 San Bernardino County is here in person by representative
8 and does oppose parole. With regard to recommendation,
9 the Panel would recommend that you have no more 115s,
10 128s, and 128(a)s, that you would participate in self- *
11 help programs. I would encourage you that if you do not
12 find a program that are appropriate for you or that you
13 can participate in because you think that limitations
14 that you look to some independent reading in the area of *
15 self-help. And the Panel would accept book reports, some
16 sort of report, two or three paragraphs, indicating that
17 you understand that you read and the impact that it had
18 on you and the effect that it had on you. That you
19 continue to earn positive chronos. Commissioner do you
20 have anything you'd like to add?

21 **DEPUTY COMMISSIONER BLONIEN:** No I don't, thank
22 you.

23 --//

24 --//

25 --//

26 --//

27 **SAMUEL DUBYAK D-54700 DECISOIN PAGE 5 10/24/06**

1 **PRESIDING COMMISSIONER DAVIS:** All right, we wish
2 you the best of luck and we are adjourned.

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A D J O U R N M E N T

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23 **PAROLE DENIED THREE YEARS**

24 **THIS DECISION WILL BE FINAL ON: February 21, 2007**

25 **YOU WILL BE PROMPTLY NOTIFIED IF, PRIOR TO THAT**

26 **DATE, THE DECISION IS MODIFIED.**

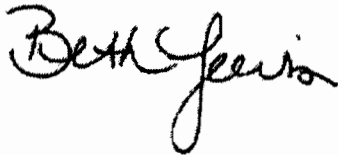
27 **SAMUEL DUBYAK D-54700 DECISOIN PAGE 6 10/24/06**

**CERTIFICATE AND
DECLARATION OF TRANSCRIBER**

I, BETH LEWIS, a duly designated transcriber, NORTHERN CALIFORNIA COURT REPORTERS, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total two in number and cover a total of pages numbered 1 through 44, and which recording was duly recorded at CORRECTIONAL TRAINING FACILITY, in SOLEDAD, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING of SAMUEL DUBYAK, CDC No. D-54700, on OCTOBER 24, 2006 and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tape(s) to the best of my ability.

I hereby certify that I am a disinterested party in the above-captioned matter and have no interest in the outcome of the hearing.

Dated January 14, 2007 at Sacramento County, California.

A handwritten signature in cursive script that reads "Beth Lewis".

Beth Lewis
Transcriber
Northern California Court Reporters

EXHIBIT

B

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

In re

MIKAEL SCHIOLD,

Petitioner-Appellee,

On Habeas Corpus.

A103107

San Francisco County Superior Court No. 4523
The Honorable Ksenia Tsenin, Judge

**SETTLEMENT AGREEMENT AND FULL
AND FINAL RELEASE OF ALL CLAIMS**

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

In re

A103107

MIKAEL SCHIOLD,

Petitioner-Appellee,

On Habeas Corpus.

**SETTLEMENT AGREEMENT AND FULL
AND FINAL RELEASE OF ALL CLAIMS**

"Releasor": MIKAEL SCHIOLD

"Releasees": GRAY DAVIS, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF THE STATE OF CALIFORNIA; THE
BOARD OF PRISON TERMS; MICHAEL E. KNOWLES,
IN HIS OFFICIAL CAPACITY AS THE WARDEN OF
MULE CREEK STATE PRISON; AND CAROL A. DALY,
IN HER OFFICIAL CAPACITY AS THE CHAIRPERSON
OF THE BOARD OF PRISON TERMS

1. Releasor, petitioner-appellee Mikael Schiold, is currently in the custody of the California Department of Corrections pursuant to his conviction by guilty plea to second-degree murder while using a deadly weapon. Schiold's sentence is fifteen years to life plus one year. Schiold is identified by the Department of Corrections as inmate number D-31112.
2. The Board of Prison Terms found Schiold suitable for parole on April 11, 2002. On September 6, 2002, the Governor reversed that decision and found Schiold unsuitable for parole.
3. Schiold filed a petition for writ of habeas corpus in San Francisco

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Superior Court, Case No. 4523, challenging the Governor's determination that he was unsuitable for parole. The Superior Court granted that petition, and respondents-appellants appealed to the First District Court of Appeal, Case No. A103107.

4. Releasor and releasees desire to enter into this settlement agreement in order to provide for a recommendation that Schiold be transferred to the custody of Sweden under the Convention on the Transfer of Sentenced Persons in full settlement of all claims which are or might have been the subject of the petition in this case, upon the terms and conditions set forth below.

5. This release is executed in consideration of the Board of Prison Terms submitting, with its approval, the application of Schiold for custodial transfer to Sweden under Government Code section 12012.1 and the Convention on the Transfer of Sentenced Persons.

6. Releasor Schiold agrees that upon approval of the transfer by the United States Department of Justice, Sweden, and any other necessary entities, and upon transfer to Sweden, he will stipulate to vacate the San Francisco Superior Court's order granting the petition in Case No. 4523. Releasor Schiold further agrees that pursuant to the satisfaction of the conditions of this paragraph, he will then dismiss the petition in San Francisco Superior Court Case No. 4523.

7. Releasor and releasees agree to stay Court of Appeal Case No. A103107 pending resolution of this settlement. The stay shall immediately terminate on October 29, 2003 if before that date releasees have not fully complied with their obligations set forth in paragraph 5. Moreover, the stay shall immediately terminate on December 25, 2003 if releasor Schiold is not in Sweden prior to that date. However, with respect to the immediately preceding sentence only, releasees may file a motion to continue the stay

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past December 25, 2003 based upon a showing that the transfer process is proceeding expeditiously. If the stay terminates pursuant to the terms of this paragraph, releasor and releasees agree that the filing and service of the opening brief in Court of Appeal Case No. A103107 will be due two weeks after the stay terminates. Releasees agree to voluntarily dismiss that appeal upon releasor's dismissal of the petition described in paragraph 6.

8. Releasor agrees that he will be held in custody by the government of Sweden until January 1, 2007.

9. Releasees agree that so long as Schiold and the government of Sweden comply with this agreement, they will take no further action against releasor arising from his conviction in San Francisco County Superior Court Case No. 119276.

10. Upon full satisfaction of the conditions set forth in paragraph 6, Schiold thereafter fully and forever releases and discharges: the respondents-appellants in the above-captioned case and in San Francisco Superior Court Case No. 4523; the State of California; the California Department of Corrections; the Chairperson of the Board of Prison Terms; and each of their employees, agents, servants, and other representatives, past and present, from all claims, demands, actions, and causes of action, including claims for attorneys' fees, court costs, and other costs of suit, that are or could have been the subject of the petition for writ of habeas corpus in San Francisco Superior Court Case No. 4523. This release expressly does not apply to the obligations set forth in this settlement agreement.

11. In making this release, Schiold understands and agrees that he relies wholly upon his own judgment, belief and knowledge as to the nature, extent, effect, and duration of liability. The making of this release is without reliance upon any statement or representation of any of the releasees or their agents.

COPY

12. It is expressly understood by Schiold that the approval and submitting of the application for transfer under the Convention on the Transfer of Sentenced Persons referenced in paragraph 5 of this release constitutes a compromise of a disputed claim, and that the releasees expressly deny any and all liability in the above-captioned case.

13. This agreement shall constitute the entire agreement between releasor and releasees, including attorney's fees, arising from the actions described in paragraph 3, and it is expressly understood and agreed that this agreement has been freely and voluntarily entered into by all parties, and each of them. It may not be altered, amended, modified, or otherwise changed in any respect except by writing duly executed by the parties to this agreement.

14. This agreement shall be governed by and construed in accordance with the laws of the State of California.

15. This release is freely and voluntarily made. Schiold has not been influenced to any extent in making this release by any representations or statements made by any of the releasees or their agents except as set out herein.

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OCT-22-2003 16:41

P.02

COPY

16. Facsimile signatures shall bind the parties to this agreement.


Date: 10/22/03
ETHAN A. BALOGH
KEKER & VAN NEST
Attorneys for Petitioner-Appellee Mikael Schiold


Date: 10/22/03
ANYA BINSACCA
Supervising Deputy Attorney General
Attorney for Releasees Gray Davis, in his official capacity as Governor of
the State of California; the Board of Prison Terms; Michael E. Knowles, in
his official capacity as the Warden of Mule Creek State Prison; and Carol A.
Daly, in her official capacity as the Chairperson of the Board of Prison
Terms

40009425.rpd

EXHIBIT

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CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

JUN 26 2006

LAW OFFICES OF
PICONE & DEFILIPPIS
625 North First Street
San Jose, CA 95112

John A. Clarke, Executive Officer/Clerk
By , Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In re,

ROBERT ROSENKRANTZ,

Petitioner,

On Habeas Corpus

Case No.: BH003529

ORDER RE: WRIT OF HABEAS CORPUS

The court has read and considered petitioner's Writ of Habeas Corpus filed on August 17, 2005, as well as the return and denial filed in response to the court's order to show cause. Having independently reviewed the record, giving deference to the broad discretion of the Board of Prison Hearings ("Board") in parole matters, the court concludes that the Board's decision denying petitioner parole is not supported by "some evidence."

Petitioner is currently serving a sentence of 15 years to life with a two-year firearm enhancement following his 1986 conviction of second degree murder. Petitioner's minimum eligible parole date was January 23, 1996. Petitioner asserts constitutional claims, including the argument that the Board violated its regulations and petitioner's right to due process by its refusal to set a parole date despite its inability to find him unsuitable for parole or to deem him an unreasonable risk to public safety if paroled.

On April 25, 2005, the Board denied petitioner parole for one year. In denying petitioner parole, the Board relied upon the circumstances of the commitment offense. When determining

unsuitability based on commitment offense, the Board may consider as a factor whether the victim was abused, defiled or mutilated during or after the offense. (See Cal. Code Regs., tit. 15, § 2402(c)(1)(C).) Here, the Board found that the victim was "abused" due to "the number of times he was shot and the manner in which he was shot." In addition, the Board concluded that the case "rises to the highest level of second-degree murder." The Board further stated in its decision that the Deputy District Attorney and the Los Angeles Sheriff's Department opposed parole. While the Board is required to consider such opposition (see Penal Code section 3042), that opposition is not a factor on which the Board may rely to deny parole as enumerated in title 15, section 2281 of the California Code of Regulations.

Towards the conclusion of the hearing, the Board summarily mentioned its concern that petitioner is a danger to his brother, Joey. The court finds that this assertion is not only unsupported by the record, but belied by the record, which contains documented evidence that contradicts any fear that the petitioner is a threat to his brother's safety. Furthermore, the court rejects the Board's inference that the absence of yearly supportive letters from petitioner's brother shows that petitioner is a danger to his brother. In fact, the petitioner's denial and traverse draws attention to a recent psychological evaluation addressing and dismissing the Board's concern for the safety of petitioner's brother. However, because this psychological evaluation was not evidence before the Board at the time of petitioner's hearing, the court may not properly rely upon it in reviewing the Board's decision. Regardless, the court finds that there is no evidence in the record that supports the conclusion that petitioner remains a danger to his brother.

The Board's sole reliance on the gravity of the offense to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. (*Biggs v. Terhune* (9th Cir. 2003) 334 F.3d 910, 916.) However, over time, should petitioner continue to demonstrate exemplary behavior and evidence of rehabilitation, denying a parole date simply because of the nature of the commitment offense raises serious questions involving his liberty interest in parole. (*Id.* at p. 917.) Here, petitioner's record is replete with reports of petitioner's exemplary conduct as well as his vocational and educational achievements over a period of many years. Indeed,

petitioner is a model prisoner in every respect. A parole decision supported by some evidence may nonetheless abrogate due process if it did not consider and weigh all favorable evidence. (*In re Capistran* (2003) 107 Cal.App.4th 1299, 1306.)

The court finds that petitioner's continual parole denials have been based mainly on the gravity of the commitment offense, the circumstances of which can never change. Therefore, the Board's continued sole reliance on the commitment offense will essentially convert petitioner's original sentence of life with the possibility of parole into a sentence of life without the possibility of parole. Petitioner has no chance of obtaining parole unless the Board holds that his crime was not serious enough to warrant a denial of parole. (*Irons v. Warden* (E.D. Cal. 2005) 358 F.Supp.2d 936, 947.)

Prior Board panels have found petitioner suitable for parole. Petitioner was found suitable for parole on June 18, 1996, but a review unit later disapproved the parole grant. At subsequent hearings in 1996, 1997 and 1998, petitioner was found unsuitable for parole based on the gravity of his offense. On September 9, 1999, petitioner was found unsuitable for parole but the panel set his prison term. On November 18, 1999, Governor Davis reversed petitioner's parole grant. On June 30, 2000, a new panel found petitioner suitable for parole, but Governor Davis reversed its decision on October 28, 2000. Petitioner has now served in excess of the maximum term for both second degree and first degree murder. Therefore, the commitment offense should no longer function as a factor for unsuitability and in that case, it should no longer operate as "some evidence" to support the Board's parole denial. Petitioner has reached the point in which the denial of parole can no longer be justified by reliance on his commitment offense. The Board's continued reliance on the circumstances of the offense runs contrary to the rehabilitative goals espoused by the prison system and has violated petitioner's due process.

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1 Therefore, this court orders that the petition for writ of habeas corpus be, and hereby is.
2 granted.

3
4 June 26, 2006



8 *David S. Wesley*
9 DAVID S. WESLEY

10 Judge of the Superior Court

11 Clerk to give notice.
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EXHIBIT

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**PSYCHOLOGICAL EVALUATION
FOR THE BOARD OF PAROLE HEARINGS
REVISED AUGUST 2006
PAROLE CONSIDERATION HEARING
SEPTEMBER 2006 LIFE TERM INMATE CALENDAR
CORRECTIONAL TRAINING FACILITY-SOLEDAD
August 18, 2006**

This is the third psychological evaluation for the Board of Parole Hearings on inmate Samuel Dubyak, CDC# D-54700. This report is the product of a personal interview as well as a review of his central file and unit health record. This interview was a single contact for the sole purpose of preparing this report.

I. IDENTIFYING INFORMATION:

Dubyak is a 63-year-old, single, Caucasian male serving 25-years-to life for Murder in the First Degree. His stated religion is Catholic. He denies nicknames or aliases and has no unusual physical characteristics.

II. DEVELOPMENTAL HISTORY:

He had no prenatal or perinatal concerns, birth defects, abnormalities of developmental milestones, history of cruelty to animals, enuresis, arson or a history of physical or sexual abuse, either as a perpetrator or a victim. He says he was born at home.

III. EDUCATION:

He has a Bachelor of Science degree in Aeronautical Engineering. He has a 12-plus measured grade point level. He has no history of special education or academic/behavioral problems. His current interests are in legal work and in studying Spanish and French. He said he recently completed a college real estate course and two semesters of accounting.

IV. FAMILY HISTORY:

His father died of a heart attack at age 62. His mother died at 77. He has an older sister, age 69, who has five children. He has a younger brother, age 58, who has one child. No one in the family has been involved in criminal activity. He is primarily in contact with his sister, who lives in California.

V. PSYCHOSEXUAL DEVELOPMENT AND SEXUAL ORIENTATION:

He says he is a heterosexual male with no history of high-risk behavior or sexual aggression.

VI. MARITAL HISTORY:

His first marriage in 1966 lasted five years. This union produced four children. The marriage was good until the second or third year when she began to accuse him of false infidelities. They divorced in 1973. His second marriage (to Lourdes, the victim) began in 1981 and ended in 1985, when he was arrested for her murder. His file indicates that she was unfaithful to him. This marriage produced one child, who lives in Puerto Rico. He is in contact with all five children.

VII. MILITARY HISTORY:

He served in the Marine Corps from 1960 to 1963. He received an honorable discharge as a lance corporal (E-3).

VIII. EMPLOYMENT/INCOME HISTORY:

When 13 years old, he worked full-time in a grocery store so he could pursue flying lessons while attending school. At age 17, he entered the Marines. Following his discharge three years later, he entered a trade school in aeronautical engineering, while also returning to work in the same supermarket where he was employed as a teenager. From 1968 to 1972, when he was approximately 26 to 30, he worked for NCR as a warehouse foreman. From 1972 to 1976, age 30 to 34, he worked in a manufacturing company in the parts department. From 1976 to 1981, age 34 to 39, he worked for a company as a production control planner. From 1981 to 1986, age 39 to 44, he worked for Hughes Aircraft as a production control analyst.

IX. SUBSTANCE ABUSE HISTORY:

He says he never abused alcohol or drugs. He rarely drank.

X. PSYCHIATRIC AND MEDICAL HISTORY:

He has several current medical problems including a pinched sciatic nerve, legs that become numb, a degenerative disc, prostate problems, stomach difficulties, carpal tunnel syndrome and has only 10% vision in his right eye. Some of the medical issues are the consequence of a 1981 car accident. Due to the pinched sciatic nerve, he walks with a cane but sometimes loses his grip.

XI. PLANS IF GRANTED RELEASE:

If paroled, he plans to live with his sister and collect Social Security. The prognosis for successful, responsible, legal, prosocial community adjustment is good.

XII. CURRENT MENTAL STATUS/TREATMENT NEEDS:

He exhibited no depressive or psychotic symptomatology. His intellectual functioning was estimated to be in the average range. He was calm, cooperative and alert. His mood,

affect and flow of thought were all normal. His insight and judgment were good. He is not currently in need of any mental health treatment.

CURRENT DIAGNOSTIC IMPRESSIONS:

AXIS I: None
AXIS II: None
AXIS III: Multiple physical problems
AXIS IV: Incarceration
AXIS V: GAF=80

The prognosis for him maintaining his current mental status is good.

XIII. REVIEW OF LIFE CRIME:

He chose not to discuss the case. Since he has denied any role in the death of his wife, he expressed no remorse or regret.

XIV. ASSESSMENT OF DANGEROUSNESS:

Within a controlled setting, his violence potential is lower than the average inmate. He has only received one 115 and one Custodial Chrono during his incarceration. If released to the community, his violence potential is lower than the average citizen. He spent much of his adult life being responsible with the instant offense his only adult conviction. If he is, indeed, guilty of the current offense, it does not seem likely that he would commit murder again. Since he does not have a life pattern of violence, the only apparent significant risk factor and precursor to violence would be his somehow revisiting the same sort of marital scenario he had with his second wife and not seeing where this could lead. It would seem, based on his history of responsible behavior, good institutional adjustment, efforts at self-improvement, intelligence and an external desire to not return to prison, that he would be able to extricate himself from this predicament before it got worse.

XV. CLINICAL OBSERVATIONS/COMMENTS/RECOMMENDATIONS:

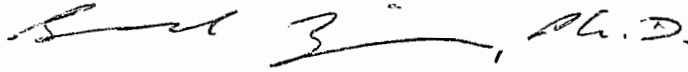
He is competent and responsible for his behavior and has the capacity to abide by institutional standards and has primarily done so during his incarceration. He does not have a mental health disorder that would necessitate treatment either while incarcerated or on parole. There are no obvious mandatory conditions of parole and recommendations. Parole decisions should be based on custody factors.



W.K. Marek, Ph.D.

Psychologist

Correctional Training Facility-Soledad



B. Zika, Ph.D.

Senior Psychologist

Correctional Training Facility-Soledad

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare that;

I am over 18 years of age and that I am the pro per Petitioner to the within attached cause of action; my complete mailing address is; Samuel A. Dubyak, D-54700, Box 689 C-115L. California State Prison, Soledad, CA 93960-0689. That I served a true and correct copy or original of the attached petition by placing said documents in sealed envelopes with postage fully prepaid, placing said envelopes in the U.S. Mail Box, to the address(es) listed below:

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
450 GOLDEN GATE AVE.
SAN FRANCISCO, CA 94102-3483

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 16 day of January, 2008, at Soledad, CA.


Samuel A. Dubyak